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Discussion on reciprocal environmental and health production standards: Could '*mirror clauses*' be WTO compatible?

On 19 January 2022, France's President *Emmanuel Macron* presented the priorities of France's Presidency of the Council of the EU (hereinafter, Council) to the European Parliament. These priorities include what France refers to as '*mirror clauses*' and greater "*reciprocity in trade*", namely the commitment to work on measures "*to ensure that imported products are subject to the manufacturing standards in force within the EU*". While specifics on such clauses remain unclear, they might require EU trading partners to follow EU production standards in order to access the EU market. This would complicate market access and would be subject to strict scrutiny in view of the EU's commitments under the World Trade Organization (hereinafter, WTO).

*France's proposal on '*mirror clauses*'*

In the *Programme for the French Presidency of the Council of the European Union 'Recovery, Strength and a Sense of Belonging*', the French Presidency advances the idea of '*mirror clauses*' noting that France would "*encourage Council discussions on reciprocal environmental and health production standards for European products and products imported from third countries with the aim of subjecting imported products to certain production requirements applied in the European Union where necessary, to strengthen the protection of health or the environment on the largest possible scale, in keeping with World Trade Organization rules ("mirror clauses")*". Under the section on '*Agriculture and forestry*', the Programme notes that the French Council Presidency would "*prioritise the introduction of sectoral mirror clauses*". In January 2021, France's President *Emmanuel Macron* announced the intention to introduce such '*mirror clauses*' in trade agreements. Notably, there is currently no specific text proposal on the table. Rather, France merely intends to encourage discussions on the topic. Still, given the likely relevance in the debate on trade policy, the proposal of such '*mirror clauses*' deserves attention form a trade law perspective.

Reciprocal production standards

Product-specific requirements, such as maximum residue levels for pesticides or maximum levels for contaminants, labelling requirements, and rules on prohibited chemicals, already apply to any product placed on the EU market, regardless of whether it was manufactured in

the EU or imported from a third country. Still, the notion of setting certain additional production standards is not new to trade policy debates in the EU. Measures regarding health, social and environmental standards have already been introduced in EU legislation and EU trade agreements. For example, at national level, France has enshrined measures on pesticides, veterinary products, animal feed and traceability in *Section 44 of Law n° 2018-938 of October 30, 2018 for the balance of trade relations in the agricultural and food sector and healthy, sustainable and accessible food for all*. Such provision imposes reciprocal livestock rearing conditions on third countries by banning the placing on the French market of, for example, imported meat from cattle treated with antibiotics, cattle fed with meat and bone meal, and cattle not individually traceable from their place of birth to their place of slaughter. Similarly, at the EU level, *Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products*, which entered into force on 28 January 2022, imposes restrictions on the use of antibiotics for animal production in the EU and extends certain of these restrictions to imported animals and animal products. According to *Regulation (EU) 2019/6*, in order to access the EU Single Market, operators in third countries must not use antimicrobials for the purpose of promoting growth or increasing yield. Finally, in the context of preferential trade agreements (PTAs), the EU includes detailed chapters on sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBT), as well as increasingly comprehensive Chapters on Trade and Sustainable Development (TSD). Notably, TSD chapters contain commitments on international labour standards, as well as on environmental concerns.

So, do the proposed '*mirror clauses*' simply represent more of the same or can they be distinguished? With respect to the focus of the measures, France's Minister of Agriculture and Food *Julien Denormandie* provided some insight, noting, on 17 January 2022, that France intended "*to build political momentum*" for "*reciprocity"* with regard to production standards of food and agricultural products, making reference to the proposal on '*mirror clauses*'. Minister *Denormandie* stated that France is preparing a position paper on this issue that is expected to be circulated within the Council during the month of February. In parallel, the Commission is currently working on a report, which would contain "*an assessment of the rationale and legal feasibility of applying EU health and environmental standards (including animal welfare standards as well as processes and production methods) to imported agricultural and agri-food products as well as identifying the concrete initiatives to ensure better consistency in their application, in conformity with WTO rules*". Given this statement, it would appear that one of the primary distinctions from previous efforts for achieving reciprocal production standards would be the nature of the focus. Rather than focusing on a given product's inherent characteristics, elements connected with a product's manufacturing processes are now potential sources of regulation. If this is accurate, it raises a host of legal questions.

*'*Mirror clauses*', a protectionist measure?*

The introduction of '*mirror clauses*' in trade agreements raises concerns among EU institutions regarding the complexity of the measure and its compatibility with WTO rules. Perhaps, one of the most impactful elements in determining the likelihood of conformity with WTO law is whether the '*mirror clause*' is connected to aspects of the regulated product itself or whether the clause aims to dictate the way(s) in which the product is produced. If we begin with the supposition that a given '*mirror clause*' relates to some product characteristic(s), there are a number of avenues for validating such clause. The most obvious of these is the creation of a clause that does not discriminate against or among imported products, nor cause an undue burden on trade. However, even if an obligation was breached, a clause might potentially be justified through a number of trade agreements, including, *inter alia*, the General Agreement on Tariffs and Trade (hereinafter, GATT), the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement), and the Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement). Most obviously, a violation of a GATT obligation might be justified by one of the General Exceptions contained in Article XX thereof. For example, a health or environmental measure, might potentially be justified by Articles XX(b) (for measures "*necessary to protect human, animal or plant life or health*") or XX(g) (for measures "*relating to the conservation of exhaustible natural resources if such measures are*

made effective in conjunction with restrictions on domestic production or consumption"). Similarly, a '*mirror clause*' that might qualify as a sanitary and phytosanitary measure, as defined by the SPS Agreement, may likewise find itself on solid ground if it '*conforms*' to an international standard (Article 3.2 of the SPS Agreement) or if there is a "*scientific justification*" or a proper risk assessment was conducted (Article 3.1 of the SPS Agreement). Under the TBT Agreement, where technical regulations are *required* to be based on international standards (provided said standards exist), a '*mirror clause*' that finds its root in international consensus will have a decent chance of withstanding legal challenge.

Where the legal analysis relating to '*mirror clauses*' becomes more complex, however, is in relation to those clauses that ostensibly attempt to police not the product characteristics themselves, but the manner in which the product is made, often referred to as processes and production methods (hereinafter, PPMs). More problematic still are those measures that aim at regulating so-called non-product-related processes and production methods (hereinafter, NPR-PPMs). One may think, for example, of the attempts to ban a product due to the use of child labour or the use of energy sources deemed potentially harmful to the environment, in the production of that product. The '*mirror clauses*' that are now being advanced by France (*e.g.*, those relating to products that are seen as exacerbating the problem of deforestation) arguably fall within these categories.

The degree to which WTO law might legitimate such measures is an open question. Perhaps the greatest illustration of the legal tensions that exist in this realm is in the interpretation of the TBT Agreement. Annex 1.1 of the TBT Agreement, in relevant part, defines a "*technical regulation*" as a "*Document which lays down product characteristics or their related processes and production methods*" (emphasis added). This would ostensibly present an opportunity to allow for measures that relate to NPR-PPMS. However, in the *EC-Seal Products* dispute, the WTO Appellate Body seemingly eschewed such an interpretation, stating that "*in the context of the first sentence of Annex 1.1 we understand the reference to 'or their related processes and production methods' to indicate that the subject matter of a technical regulation may consist of a process or production method that is related to product characteristics*". To determine whether a measure lays down '*related PPMs*', a WTO panel will, according to the Appellate Body, have to examine whether the PPMs prescribed by the measure at issue have *"a sufficient nexus to the characteristics of a product in order to be considered related to those characteristics*". While this ruling does not necessarily rule out NPR-PPMs as technical regulations, it certainly appears to be a move in that direction.

Obviously, the TBT Agreement is not the only option for attempting to substantiate such a clause. It is possible, for example, that Article XX(a) of the GATT, which allows for an otherwise GATT-inconsistent measure to be justified if it is deemed necessary to protect public morals, may be an option to justify an otherwise GATT-inconsistent NPR-PPM. What is clear is that substantiating the types of NPR-PPMs that are possibly envisaged would be an uphill battle.

A rather sceptical perspective from the European Commission

For its part, the European Commission seems acutely aware of the legal challenges that might await France's proposal on '*mirror clauses*'. In an interview, the Director-General of the European Commission's Directorate-General for Trade *Sabine Weyand* stated that "*to influence and improve production standards, we must do so by working with third-party countries to encourage them to raise their standards, and not simply by trying to impose our production methods on them*". Director-General *Weyand* explained that, in some situations, it would be "*appropriate and legitimate to insist that certain characteristics be respected in production methods*". Director-General *Weyand* stated that, when *"mirror clauses are justified by an international challenge such as environmental protection, and when they do not create arbitrary obstacles to trade, they appear legitimate and can be envisioned in the framework of our trade agreements*". Director-General *Weyand* underlined that imposing certain production methods could be considered protectionist when it is considered more trade-restrictive than necessary. Similarly, the European Commission's Executive Vice-President and European Commissioner for Trade *Valdis Dombrovskis* stated that any intention by the EU to impose

food-growing standards on non-EU countries through '*mirror clauses*' would *"need to minimize disruptions of trade [and] need to not be more far-reaching than strictly necessary".*

Towards greater clarity in the coming weeks

Farmers in third countries have already stated that requirements to meet the same environmental standards as in the EU, in order to access the EU market, could become a major hurdle to trade. Existing rules already ensure that products placed on the EU market are safe and trade agreements increasingly contain commitments on social and environmental issues. The specific design and application of these '*mirror clauses*' will need to be assessed and the EU must ensure that such rules are indeed compliant with its WTO commitments and not merely a populistic or protectionist response to concerns by EU manufacturers and farmers. The forthcoming proposal by France and the Commission's assessment should shed some more light on this initiative.

The Government of Indonesia imposes a 20% mandatory domestic sales requirement for palm oil and tightens the existing *Domestic Market Obligation* in the coal sector

As an effort to prioritise the availability of palm oil and to address the increasing price of cooking oil, the Government of Indonesia enacted a *Domestic Market Obligation* (hereinafter, DMO) on exports of crude palm oil (hereinafter, CPO) through *Ministry of Trade Regulation Number 2 of 2022 concerning Amendments to MOT Regulation No. 19 of 2021 on Export Regulatory Policy*. Essentially, *MOT Regulation No. 2/2022* requires exporters to sell 20% of their CPO to the domestic market. A similar DMO was also re-introduced in the coal sector, as the Government aims at ensuring the availability of coal supply for the domestic power plants through *Ministry of Energy and Mineral Resources Decree Number 13 of 2022*. Aimed at ensuring supply and low prices for the domestic market, such measures have an impact on trade and should be subject to increased scrutiny in view of Indonesia's international commitments.

The concept of a Domestic Market Obligation

A DMO is a measure through which the Government of Indonesia requires producers in certain commodity sectors to sell a particular share of their production to the domestic market. To ensure compliance, the Government usually requires fulfilment of DMO obligations as a prerequisite to receiving an export permit. In addition, the Government can impose fines for non-compliance with the DMO.

DMO measures are typically imposed to ensure the availability of commodities for the domestic market. In Indonesia, a DMO usually applies in strategic sectors, such as the coal sector, in view of the high demand for local use. While a DMO would help to ensure the availability of commodities in the domestic market, it might also disrupt the flow of exports, as producers must prioritise fulfilling their DMO before being able to export.

Indonesia's Domestic Market Obligation for crude palm oil (CPO)

One of the derivative products of CPO is cooking oil. The recent increase in the world market price of CPO has led to a significant increase of the domestic price of cooking oil in Indonesia. More specifically, between 2021 and 2022, the domestic price of cooking oil increased by 46.92% and affected its availability on the Indonesian market. To address this issue, the Government of Indonesia introduced a DMO and a *Domestic Price Obligation* (DPO), both of which are preconditions to obtain an export permit for CPO. The *Domestic Price Obligation* (DPO) is a maximum price set by the Government requiring CPO producers to sell their products in accordance with that price on the domestic market. The two measures were implemented to secure a sufficient supply of CPO for the domestic market, so as to stabilise the domestic market price of cooking oil, and, ultimately, to provide affordable products for

local consumers. The Government of Indonesia introduced the requirement that CPO producers must provide proof that they have allocated 20% of their planned total CPO exports to be sold domestically, in order to be eligible for an export permit. The price threshold of the allocated 20% is set by *MOT Regulation No. 2/2022* to a maximum price of IDR 9,300 (*i.e.*, USD 0.69) per kilogramme.

In order for CPO exporters to obtain the necessary export permit, they are now required to show proof of their domestic supply distribution plan for the following six months, along with evidence of the sale of CPO onto the domestic market (*e.g.,* purchase orders, delivery order, and tax invoices). Indonesia's Ministry of Trade will withhold the export permit until such proof is received and compliance with the DMO and DPO is confirmed. This obligation applies as of 18 January 2022 and for six months, until mid-June 2022. After these initial six months, the Government will assess the market prices of CPO and cooking oil. More specifically, if the price of CPO will then have decreased from the current market price of around IDR 14,000 (USD 0.97) per kilogramme to a more "*normal*" level, which the Government considers to be at around IDR 9,300 (*i.e.*, USD 0.65) per kilogramme, the Government would revoke the DMO and DPO requirements.

To curb the increasing price of cooking oil, the Government of Indonesia also introduced *Ministry of Trade Regulation No. 6 of 2022 concerning the Highest Retail Price for Palm Cooking oil*, through which the Government sets the maximum retail prices for cooking oil (*i.e.*, IDR 11,500 per litre for bulk cooking oil and IDR 14,000 per litre for premium packaged cooking oil, which is the cooking oil usually sold in retail supermarkets). As stated by the *Foreign Trade Director-General* within Indonesia's *Ministry of Trade, Indrasari Wisnu Wardhana*, the Government of Indonesia might impose a similar requirement on other palm oil-related products in order to prioritise the use of such raw materials by domestic industries.

The Domestic Market Obligation for coal

In addition to the palm oil sector, the Government of Indonesia applies a DMO for the coal sector. In fact, a DMO in the coal sector is not a new policy for Indonesia, as it was introduced back in 2009 through *Law No. 4 of 2009 concerning Mineral and Coal Mining*. Article 5(1) thereof stipulates that, with regard to the national interest, the Government of Indonesia may establish a national policy on prioritising minerals or coal for the domestic market. Consequently, there were a number of amendments to the DMO for coal, including the *Ministry of Energy and Mineral Resources Decree* that is issued every year and which sets the DMO share according to market conditions and to accommodate domestic needs.

During January 2022, the Government of Indonesia had imposed a one-month coal export ban, as regulated under the *Circular Letter of the Directorate-General of Mineral and Coal of the Ministry of Energy and Mineral Resources No. B-605/MB.05/DJB.B/2021* issued on 31 December 2021. In order to ensure the availability of coal for domestic use, Indonesia's Minister of Energy and Mineral Resources issued *ESDM Decree No. 13/2022,* enacted on 19 January 2022. Under *ESDM Decree No. 13/2022,* only miners that have fulfilled their DMO, and that have paid any relevant fines as compensation for not fulfilling the DMO in 2021, are allowed to resume exports. Additionally, *ESDM Decree No. 13/2022* requires coal mining businesses to supply 25% of their yearly production to the domestic market, with a maximum price of USD 70 per metric tonne. These measures were introduced due to the low coal supplies for Indonesia's State-owned power plant company *Perusahaan Listrik Negara (PLN)*, which threatened to disrupt the availability of electricity in Indonesia. Indonesia still heavily relies on coal-fired power plants, with 61% of Indonesia's electricity coming from coal.

Despite the existence of the DMO for coal from 2009 to 2021, most coal mining businesses avoided fulfilling their DMO, preferring to export their goods due to the more profitable world market prices. The maximum price of USD 70 per metric tonne under the DMO, which has been applicable since 9 March 2018, is much lower than the international market price that stands at around USD 183 per metric tonne. As, under previous laws, compliance with the DMO was not mandatory for a producer to obtain an export permit, nor did previous laws

provide for strict sanctions in case of non-compliance, many miners risked non-compliance with the DMO. The *ESDM Decree No. 13/2022* now enforces the DMO through stricter sanctions and fines, including a 60-day operating ban and a revocation of mining permits.

Effects on local industries and Indonesia's exports

Considering that Indonesia remains the world's top exporter of both coal and CPO, the DMOs in these two strategic sectors will likely affect the global export market. More specifically, the DMOs might lead to decreased exports for both coal and CPO in the coming months, as producers will be required to adjust and meet the new domestic requirements before they can obtain an export permit.

With particular regard to the coal sector, following the reauthorisation of coal exports on 1 February 2022, only around 200 out of 600 coal mining businesses were allowed to export, given that they had fulfilled their DMO and had paid all required fines for not fulfilling the DMO in 2021. Therefore, coal exports will likely decrease until all miners have fulfilled their DMO and have paid imposed fines.

Similarly, with respect to the export of CPO, exporters will need time to adjust to the new requirement to draw up a six-month plan of DMO and submit the required evidence to the Ministry of Trade, in order to obtain an export permit. This will affect the exports of CPO in the coming months.

Yet another 'protectionist' measure?

From the perspective of the Government of Indonesia, the DMO requirements in the coal and CPO sectors are needed to ensure the availability of supply for local use. However, these measures will likely be considered by trading partners as yet another '*protectionist*' measure by the Government of Indonesia and could be subject to scrutiny in view of Indonesia's international trade commitments.

In particular, the DMO requirements could be considered as export restrictions under Article XI:1 of the General Agreement on Tariffs and Trade (hereinafter, GATT) 1994. In general terms, Article XI:1 of the GATT provides that import and export restrictions other than duties, taxes, or additional charges are prohibited. Measures such as quotas, import or export licences, and DMOs, which have a limiting impact on the number of products being exported and imported, are trade restrictive by nature. The recently introduced rules on coal and CPO clearly limit exports out of Indonesia by requiring exporters to have completed their DMO according to the required percentage (*i.e.,* 25% for coal and 20% for CPO) before traders can obtain an export permit. Previous DMO requirements for coal and nickel have led to a WTO dispute settlement complaint by the European Union (WT/DS592/1), which argues that the measure restricts exports of coal and nickel.

For purposes of justification, considering that the measure was purportedly implemented due to a supply shortage for coal and CPO, which are important for domestic use, namely for electricity generation and the production of cooking oil, Indonesia might argue that the DMO measures fall within the exceptions of Article XI of the GATT 1994, notably under paragraph 2(a) thereof, which provides that export prohibitions or restrictions can be temporally applied to "*prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party*".

In addition, the WTO Appellate Body Reports in the *China Raw Materials* case (*i.e.,* WT/DS394/AB/R; WT/DS395/AB/R; and WT/DS398/AB/R) clarified that the justification of critical shortages includes critical quantity shortages of products that are absolutely indispensable or necessary and that the measure applies only temporarily to prevent or relieve such shortages. The same Appellate Body Reports clarified that '*critical shortages*' refers to *"deficiencies in the quantity that are crucial, that amount to a situation of decisive importance"*. Indonesia might argue that the DMO requirements are necessary, as, for Indonesia, coal is

indispensable or necessary (noting the fact that 61% of Indonesia's electricity is sourced from coal) and that the shortage of coal would have widespread and critical effects especially for the industries. CPO is also necessary for Indonesia, as it affects the availability of cooking oil for households, businesses, and Micro, Small, and Medium Enterprises. Moreover, the DMO measure for CPO is temporary, as the Government stated that it would be revoked once the price for CPO had decreased to a more normal level (*i.e.,* to IDR 9,300 (*i.e.*, USD 0.65) per kilogramme).

Possibility of similar measures to be implemented in other sectors

Given the trend of similar policies that aim at prioritising the domestic market, similar requirements can be expected in other commodity sectors. In this context, Indonesia's President *Joko Widodo* underlined multiple times his ambition for Indonesia to stop exporting raw materials and to prioritise the development of Indonesia's downstream industries. Stakeholders should closely monitor any related developments and the application of the new measures in view of their inevitable effects on trade.

The Court of Justice of the EU rules on translations of legal names of food ingredients

On 13 January 2022, the Court of Justice of the European Union (hereinafter, CJEU) delivered its judgment in Case C-881/19, *Tesco Stores ČR a.s.* v *Ministerstvo zemědělství* (Ministry of Agriculture, Czech Republic), in a request for a preliminary ruling from the *Krajský soud v Brně* (Regional Court, Brno, Czech Republic) concerning the use of the name of the compound ingredient '*chocolate powder*' in the mandatory list of ingredients, required by Article 9 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) for a food marketed in a Member State. Article 2(h) of the FIR states that *"compound ingredient means an ingredient that is itself the product of more than one ingredient".* The judgement involving the description of chocolate powder in food products sold in stores in the Czech Republic illustrates the potential danger of certain translations carried out by food business operators.

Facts, procedure, and the question referred to the CJEU

The *Tesco-Group* is a multinational retailer established in the United Kingdom, which operates, *inter alia*, supermarkets in the Czech Republic. Its Czech subsidiary, *Tesco Stores ČR a.s.* (hereinafter, Tesco) marketed certain food items under the brand name '*Monte*' in its Czech stores. The products at issue were labelled with an ingredient list, which listed '*čokoládový prášek'* and which, according to the CJEU's Advocate General's opinion "*would, freely translated, have a meaning akin to 'powder of chocolate' in English*", without further specifying the ingredients from which that compound ingredient was made.

On 27 May 2016, the Brno Inspectorate of the Czech Agriculture and Food Inspection Authority ordered *Tesco* to recall those products from the Czech market because their list of ingredients "*included the term 'čokoládový prášek' without an itemised list of ingredients being provided for this compound ingredient, as required by Article 9(1)(b) in conjunction with Article 18(1) and (4) of the Food Information Regulation*". The Czech Agriculture and Food Inspection Authority prohibited the further placement of those products on the market and stated that "*it follows from point 2(c) of part A of Annex I to Directive 2000/36 that the term 'čokoláda v prášku' ('chocolate powder') must be used in Czech and not the expression 'čokoládový prášek' ('chocolate in powder form')*". In fact, *Tesco* had used its own translation into Czech, namely *'čokoládový prášek'*, of the Polish and/or German official language versions of the designation for those products, rather than the designation provided in the Czech-language version of *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* (hereinafter, Chocolate Directive), namely *'čokoládový prášek'*.

After objecting against those measures and after several administrative and judicial instances, the Regional Court Brno, to which the case was referred back from the Supreme Administrative Court of the Czech Republic, submitted a request for a preliminary ruling and asked the CJEU for its guidance on the following question: "*Should the rule set out in point 2(a) of part E of Annex VII to Regulation No [1169/2011] be interpreted such that, with respect to a food intended for an end consumer in the Czech Republic, a compound ingredient listed in point 2(c) of part A of Annex I to Directive [2000/36/EC] may only be listed among the ingredients of the product without a precise specification of its composition if that compound ingredient is labelled precisely in line with the Czech language version of Annex I to Directive 2000/36/EC?*".

The applicable food information rules

The rules applicable in this case are set out in the Chocolate Directive and in the FIR. Annex I to the Chocolate Directive on '*Sales names, definitions and characteristics of the products*', provides, under Part A, in point 2, that: *"…(c) Powdered chocolate, chocolate in powder* [:] *designate the product consisting of a mixture of cocoa powder and sugars, containing not less than 32% cocoa powder; …*". The Czech-language version of that provision contains the single designation '*čokoláda v prášku*' for that same product. It must be noted that some language versions, such as the English-language versions, permit the use of two ('*powdered chocolate*' and '*chocolate in powder*') or even three (the Dutch-language version lists '*chocoladepoeder*', '*gesuikerd cacaopoeder*', and '*gesuikerde cacao*') different expressions for powdered chocolate.

Language requirements are set out in Article 15 of the FIR, which 'provides that: '*1. […] mandatory food information shall appear in a language easily understood by the consumers of the Member States where a food is marketed […]*". Article 17 of the FIR on '*Name of the food*' states that: "*1. The name of the food shall be its legal name. In the absence of such a name, the name of the food shall be its customary name, or, if there is no customary name or the customary name is not used, a descriptive name of the food shall be provided […]*". *"Legal name"* is defined in Article 2(n) of the FIR as *"the name of a food prescribed in the Union provisions applicable to it or, in the absence of such Union provisions, the name provided for in the laws, regulations and administrative provisions applicable in the Member State in which the food is sold to the final consumer or to mass caterers; […]*".

Article 18 of the FIR on the '*List of ingredients*' provides that: "*1. The list of ingredients […] shall include all the ingredients of the food, in descending order of weight, as recorded at the time of their use in the manufacture of the food. 2. Ingredients shall be designated by their specific name, where applicable, in accordance with the rules laid down in Article 17 and in Annex VI*". Part E of Annex VII to the FIR on '*Designation of compound ingredients*' is worded as follows: "*1. A compound ingredient may be included in the list of ingredients, under its own designation in so far as this is laid down by law or established by custom, in terms of its overall weight, and immediately followed by a list of its ingredients. 2. Without prejudice to Article 21, the list of ingredients for compound ingredients shall not be compulsory: (a) where the composition of the compound ingredient is defined in current Union provisions, and in so far as the compound ingredient constitutes less than 2% of the finished product; however, this provision shall not apply to food additives, subject to points (a) to (d) of Article 20*".

The CJEU's judgment

The request for a preliminary ruling concerned whether a compound ingredient listed in Annex I to the Chocolate Directive may only be listed among the ingredients of the product, without a precise specification of its composition, if that compound ingredient is labelled precisely in line with the Czech language version of Annex I to the Chocolate Directive.

The CJEU essentially based its decision on three matters. First, the term '*chocolate powder*' in the Annex to the Chocolate Directive constitutes a '*legal name*' within the meaning of Article 2(2)(n) of the FIR, which is required by the EU legislation applicable to that foodstuff. In accordance with Articles 17 and 18 of the FIR, such designation must be used throughout the

territory of the EU. Under Article 15(1) of the FIR, that name must appear on the food in a language easily understood by consumers in the EU Member State in which that food is marketed.

Second, the Court held that it is only permissible not to list the ingredients contained in a compound ingredient, such as that at issue in the main proceedings, provided that the compound ingredient is indicated by a name provided for it by EU legislation and in a language easily understood by the consumers of the EU Member State in which the food is marketed.

In the third place, the Court examined whether the exception provided for in point 2(a) of Part E of Annex VII to the FIR may also apply to a situation such as that at issue in the main proceedings, in which the economic operator does not use the name of the compound ingredient as contained in the Czech language version of Annex I to the Chocolate Directive, but instead uses its own translation into Czech of the name of that ingredient, as contained in the other language versions of Annex I. In this regard, the CJEU refers to the Advocate General's observations in his Opinion that consumers cannot, on the basis of such free translations, identify with certainty the composition of such a compound ingredient by simply reading its reference in the list of ingredients of the food in which it is contained. The CJEU held that in the present case, it should be noted that only the term '*čokoláda v prášku*' ('*chocolate powder*') was precisely defined in the Annex I to the Chocolate Directive, while the expression '*čokoládový prášek*' ('*chocolate in powder form*') was not defined in EU law.

The main take-aways from the case

According to the judgement of the CJEU, food manufacturers may only list a compound ingredient among the ingredients of the product, without a precise specification of its composition, if that compound ingredient is labelled in the precise language version of EU legislation relevant for the EU Member State concerned.

Tesco's mistake was not having used the correct compound ingredient name, namely '*čokoláda v prášku*', and having replaced it with its own translation into Czech of the name of that ingredient in other language versions of the Chocolate Directive, such as the German language version ('*Schokoladenpulver*') and the Polish language version (which bear the designations '*proszek czekoladowy*' and '*czekolada w proszku*'). Such mistakes can, in fact, easily occur using, for example *Google* translations of the German term or of the Polish terms. The result is actually never the term '*čokoláda v prášku*' of the Czech language version used in the Chocolate Directive, but the term '*čokoládový prášek*' or even '*prášková čokoláda'*. This shows that a correct translation may not always be compliant, and that appropriate regulatory translation requires the proper identification of an ingredient under the applicable laws. Therefore, it may not be sufficient to translate food labels and ingredients lists by means of machine translators, or by native speakers without a regulatory background.

As often, there are important considerations made in the Advocate General's opinion. Notably, in the context of translations of diverging language versions, it states that: "*The principle of equal authenticity and the Court's case-law concerning diverging language versions of EU legislative acts thus in no way supports a right for an economic operator to pick whichever language version of a given directive or regulation it may prefer and then to use its own translations of defined terms and designations found in that version as if those translated terms and designations were taken from the official version in the corresponding language*". Moreover, the Advocate General argues that "*permitting the use of one chosen language version of a defined term or designation as a basis for translations into other languages would be to give that version a higher rank than the other versions. Permitting all economic operators to make such choices and then to each translate their chosen versions at leisure would inevitably lead to enormous inconsistencies as each private economic operator could create its own set of language versions of those terms or designations. This is the antithesis to a uniform interpretation of EU law*".

Conclusions

The *Krajský soud v Brně* (Regional Court, Brno, Czech Republic) now needs to deliver its judgment in the main proceeding, following the guidance from the CJEU. Food business operators are recommended to exercise great diligence when translating names of ingredients, as they must be aware of their legal names, in particular in cases where specific names exist in EU legislation, such as in the Chocolate Directive.

Recently adopted EU legislation

Trade Law

- *Commission Regulation (EU) 2022/175 of 9 February 2022 amending Annex IX to Regulation (EC) No 999/2001 of the European Parliament and of the Council as regards import conditions for movements of ovine and caprine animals intended for breeding from Great Britain into Northern Ireland (1)*

Trade Remedies

- *Commission Implementing Decision (EU) 2022/161 of 3 February 2022 terminating the examination procedure concerning obstacles to trade within the meaning of Regulation (EU) 2015/1843 applied by the United Mexican States consisting of measures affecting the import of Tequila*

Food Law

- *Commission Implementing Regulation (EU) 2022/187 of 10 February 2022 authorising the placing on the market of cetylated fatty acids 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 (1)*

- *Commission Implementing Regulation (EU) 2022/188 of 10 February 2022 authorising the placing on the market of frozen, dried and powder forms of Acheta domesticus 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 (1)*

- *Commission Implementing Regulation (EU) 2022/176 of 9 February 2022 correcting certain language versions of the Annex to Implementing Regulation (EU) 2021/632 laying down rules for the application of Regulation (EU) 2017/625 of the European Parliament and of the Council as regards the lists of animals, products of animal origin, germinal products, animal by-products and derived products, composite products, and hay and straw subject to official controls at border control posts (1)*

- *Commission Implementing Regulation (EU) 2022/166 of 8 February 2022 on cancelling the registration of protected geographical indication 'Holsteiner Karpfen' (PGI)*

- *Commission Implementing Regulation (EU) 2022/167 of 8 February 2022 on cancelling the registration of protected geographical indication 'Viande de porc, marque nationale grand-duché de Luxembourg' (PGI)*

Other

- *Commission Implementing Decision (EU) 2022/162 of 4 February 2022 laying down rules for the application of Directive (EU) 2019/904 of the European Parliament and of the Council as regards the calculation, verification and reporting on the reduction in the consumption of certain single-use plastic products and the measures taken by Member States to achieve such reduction (1)*

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