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## The European Parliament prepares its position on the Carbon Border Adjustment Mechanism (CBAM), as questions on its WTO compatibility remain

On 28 February 2022, the European Parliament's Committee on International Trade (hereinafter, INTA) is scheduled to vote on its position on the European Commission's (hereinafter, Commission) Proposal for a *Regulation establishing a Carbon Border Adjustment Mechanism* (hereinafter, CBAM). The CBAM aims at ensuring that "*the price of imports reflects more accurately their carbon content*". The Commission's Proposal for the CBAM states that its objective is to regulate greenhouse gas (hereinafter, GHG) emissions "*embedded in certain goods upon their importation into the customs territory of the Union, with the purpose of preventing the risk of carbon leakage*". Debates in the INTA Committee indicate diverging opinions among Members of the European Parliament (hereinafter, MEPs) regarding certain specificities of the CBAM. It is expected that the final report by the European Parliament's Committee on Environment Public Health and Food Safety (hereinafter, ENVI), the leading Committee on the legislative file, would propose a number of significant amendments to the Commission's Proposal. Questions remain on whether the CBAM would be compatible with WTO rules and the EU must ensure that the CBAM does not become an instrument to introduce or hide trade barriers affecting third country products exported to the EU.

### *The functioning of the proposed mechanism*

After months of debate (see *Trade Perspectives*, Issue No. 17 of 18 September 2020 and Issue No. 6 of 26 March 2021), on 14 July 2021, the Commission had presented its proposal for a *Regulation on the establishment of a Carbon Border Adjustment Mechanism* (CBAM). The Commission's Proposal provides that the CBAM would mirror the EU's Emission Trading System (hereinafter, ETS) and would regulate GHG emissions embedded in certain third country products imported into the EU Customs Union belonging to the sectors of: 1) Cement; 2) Electricity; 3) Fertilisers; 4) Iron and steel; and 5) Aluminium. The CBAM aims at addressing the issue of '*carbon leakage*' and at incentivising other countries to join climate change mitigation efforts. Carbon leakage refers to the situation in which EU production would move to non-EU countries that have less ambitious and laxer emission rules and, thus, lower costs of production related to climate policies. According to the Commission's Proposal, the CBAM would apply to goods from the above-mentioned sectors and to processed products from those goods originating in third countries, but would not apply to goods originating in Iceland,

Liechtenstein, and Norway, as those countries participate in the EU's ETS, and in Switzerland, whose ETS is linked with the EU's ETS.

In the EU, certain emissions are currently regulated through the EU's ETS. The ETS is based on the '*cap-trade system'* principle, which means that a limited cap is set on the total amount of certain GHG emissions that can be emitted by defined industry sectors. Within the cap, the companies active in sectors covered by the ETS system may receive emission allowances, either free of charge (*i.e.*, ETS free allowance allocation, which is used to safeguard the competitiveness of the regulated industries and to avoid carbon leakage) or purchased through public auctioning, which they can subsequently trade with other covered companies. The cap is then linearly reduced over time so that total emissions decrease (see *Trade Perspectives*, Issue No. 5 of 10 March 2017).

The Commission proposal foresees that the CBAM would, eventually, cover both direct and indirect GHG emissions, which are released during the production of the covered goods, as well as their upstream products (*i.e.*, inputs used during the goods' production process). However, the CBAM would initially only apply to direct emissions. Direct emissions are emissions from sources that are owned or controlled by the reporting entity, while indirect emissions relate to the production process of the goods. The Commission's Proposal defines '*indirect emissions*' as "*emissions from the production of electricity, heating and cooling, which is consumed during the production processes of goods.*

Under the proposed CBAM, the importation of the covered goods would have to be made by a trader that has been authorised by the competent authority. Each EU Member State would be required to designate such competent authority to administer the mechanism. Any authorised trader (*i.e.*, authorised declarant in the terms of the Proposal) would be required to submit, annually, a CBAM declaration to the CBAM Authority containing information on: 1) The total quantity of goods imported during the previous calendar year; 2) The emissions embedded in the goods imported into the EU; and 3) The number of CBAM certificates corresponding to the total embedded emissions, which the declarant must surrender to the CBAM Authority annually. Notably, in case the authorised declarants were to have already paid a carbon price "*in the country of origin for the declared emissions*", they could claim a reduction in the number of CBAM certificates to be surrendered. Authorised declarants must ensure that the declared embedded emissions are verified by an independent verifier accredited by the CBAM Authority.

***Proposed amendments to the Commission's Proposal***

The exact text and scope of the CBAM Regulation is still uncertain, as the Proposal is still under discussion and has yet to be agreed and adopted by the Council of EU and the European Parliament as the EU's co-legislators. So far, the Commission's Proposal has received wide support in both institutions, including a shared commitment that the CBAM must respect the EU's WTO obligations. At the same time, certain proposed amendments in the European Parliament's ENVI and INTA Committees, demonstrate divisions among MEPs on key aspects that are also of relevance for the assessment of WTO compatibility.

The INTA Committee and the ENVI Committee have proposed a number of amendments that appear to be more ambitious than the current Proposal. On 22 November 2021, the *Rapporteur* for the CBAM for the INTA Committee, MEP *Karin Karlsbro*, submitted her Draft Opinion. The report has been discussed by the INTA Committee and Members of the various political groups have submitted more than 500 amendments. Unsurprisingly, the main topics under discussion among MEPs relate to: 1) Sector coverage, namely requesting to expand the scope to organic chemicals, hydrogen, and polymers; 2) The CBAM's application to direct and indirect emissions; 3) Potential exemptions, notably for least developed countries (hereinafter, LDCs); and 4) The period of time to phase out ETS free allowance allocation.

The free allowance allocation is a kind of subsidy provided to EU industries, which enables them to exceed a limited amount of $CO_2$ emissions. The CBAM would apply only to imports

and does not foresee any kind of free allowances. The Commission's Proposal foresees to continue providing free allowances under the EU's ETS during the transition period of the CBAM from 2023 to 2025, during which third country exporters would not be required to purchase CBAM certificates, but only to report their carbon emissions. The free allowances on the EU market would then be phased out at the end of the CBAM's transition period. The ENVI Committee proposed to apply the CBAM before 2025 and to immediately phase out free allowances. The INTA Committee has proposed instead to phase out the free allowances only after 2030, without changing the transition period of the CBAM. Notably, the INTA Committee's proposal would imply the application of free allowances for EU industries without a similar mechanism for '*like*' products imported from third countries during the period from 2026 to 2029.

The INTA Committee will vote on the amendments on 28 February 2022 and the adopted opinion will then be taken into account by the ENVI Committee for the final report to be adopted by the European Parliament's plenary.

***Potential issues of inconsistency with international trade rules***

Although the Commission avoided the use of the term '*tax*' in its draft Regulation, the CBAM may not escape the classification as an "*internal tax or other internal charge*" under Article III:2 of the General Agreement on Tariffs and Trade (hereinafter, GATT). In that regard, the GATT prohibits levying internal taxes or charges on imported goods in excess of those applied to '*like*' domestic products. The potential point of friction relates to the continuation of a free allocation of emission allowances to domestic products under the EU's ETS, notably to EU industries "*deemed to be exposed to a significant risk of carbon leakage*" as stated by the Commission. Instead of purchasing emission allowances through public auctioning, as required under the EU's ETS, industries that are listed in the so-called '*carbon leakage list*' benefit from the free allowances. Similar to the scope of the CBAM, the EU's carbon leakage list also covers, *inter alia*, cement, fertilisers, iron and steel, and aluminium. While third country exporters of such goods would be required to purchase CBAM certificates when intending to access the EU market, EU producers of '*like*' products would receive free allowances until they are phased out. The CBAM could, therefore, amount to an internal charge in excess of the one applied to '*like*' domestic products and be considered as inconsistent with the national treatment obligation under the GATT.

The current regime of free distribution of emission allowances under the EU's ETS, if maintained in parallel with the CBAM, could also prove incompatible with the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, SCM Agreement). The free allowances could be considered as actionable subsidies, which are defined as financial contributions by a government or public body conferring a benefit to a specific group of undertakings and causing adverse effects to the interests of other WTO Members. Notably, since the phase out is expected to be gradual, the allocation of free allowances under the ETS and the CBAM would, at least for some time, apply in parallel, which would amplify the subsidy concerns of the free allowances because domestic EU industries manufacturing cement, fertilisers, iron and steel, and aluminium would benefit from a double protection: 1) The free allocation of emission allowances; and 2) The CBAM applying to third country products entering the EU market. Therefore, extending the period to phase out the free allowances, as proposed by certain groups within the European Parliament, would extend this double protection/advantage to EU industries and, arguably, the discrimination again '*like*' imported products.

Another contentious issue concerns the proposal by certain MEPs within the INTA Committee to include export rebates or export subsidies in the Proposal. The proponents argue that such export adjustments should be granted to products that are manufactured in the EU and exported to third countries that do not have in place equivalent carbon limitations or carbon pricing policies. On this issue, the Director for Indirect Taxation and Tax Administration of the European Commission's Directorate-General for Taxation and Customs Union, *Maria Elena Scoppio*, noted that the Commission was sceptical that a rebate system would be WTO

compatible. Export rebates are only legal under WTO law when they are linked to taxes on goods (*e.g.*, value-added tax, VAT). The rebates might be considered a trade distorting measure under the SCM Agreement.

The Commission's Proposal does not provide exemptions for LDCs. Members of the European Parliament's INTA Committee have proposed to exempt LDCs from the scope of the CBAM Regulation. The Commission immediately reacted, noting that fully excluding LDCs and/or third countries with a carbon price in place from the scope of application of the CBAM was not possible, as it would make the mechanism WTO incompatible. However, the Commission underlined that it would look into options for LDCs. WTO rules do allow for preferential tariff treatment to imports from LDCs and explicitly call for special and differential treatment for developing country WTO Members.

**The road ahead**

The final report from the European Parliament's ENVI Committee is expected to be debated and voted by the European Parliament's plenary during the first semester of 2022 and become the European Parliament's final position for the forthcoming inter-institutional '*trilogue*' negotiations. The multitude of amendments shows the relevance and legal complexity of the measure. Despite the various specific points of potential friction between the CBAM and WTO rules, the CBAM could become an innovative policy tool to address third country GHG emissions and achieve a level playing field that advances the objective of reducing GHG emissions. As always, the EU should listen carefully to its trading partners, especially when these are developing countries, and actively and meaningfully taking into consideration their special needs as well as reasonably available alternatives that would be less trade restrictive and non-discriminatory. Businesses and EU trading partners should closely follow the related developments and engage in all relevant *fora*.

## Domestic interests and political instability delay the ratification of the Regional Comprehensive Economic Partnership (RCEP) in some ASEAN Member States

On 15 November 2020, with the objective to boost trade and economic cooperation in the Indo-Pacific region, the ten Member States of the Association of Southeast Asian Nations (hereinafter, ASEAN) (*i.e.*, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam) and five of its trading partners that have preferential trade agreements with ASEAN (*i.e.,* ASEAN + 1 FTA partners, with the exception of India and Hong Kong), namely China, Australia, Japan, South Korea, and New Zealand, signed the Regional Comprehensive Economic Partnership Agreement (hereinafter, RCEP). Following the ratification by six ASEAN Member States and three non-ASEAN signatories, the RCEP entered into force on 1 January 2022. While the majority of parties to the RCEP have deposited with the ASEAN Secretariat their instruments of ratification (*i.e.,* the document binding an RCEP party to the trade agreement and transposing its obligations into national legislation) to bring RCEP into effect, three ASEAN Member States, namely Indonesia, the Philippines and Myanmar, have yet to ratify it, due to domestic concerns and political instability. The delayed ratification by the three ASEAN Member States will impede ASEAN to fully benefit from the trade preferences agreed under the RCEP, which is unfortunate in light of the post-pandemic economic recovery agenda within the region.

***Opportunities through the RCEP***

The RCEP is considered the world's largest free trade area, covering approximately 30% of the world's gross domestic product (*i.e.*, USD 26.2 trillion), 30% of the total world's population (*i.e.*, 2.3 billion), and 25% of trade volume from global trade in goods and services (*i.e.*, USD 12.7 trillion).

The RCEP is supposed to provide economic opportunities for its parties and is projected to strengthen and improve Asia-Pacific trade and economic cooperation. Under the RCEP, parties will eliminate as much as 90% of tariffs in trade in goods. It is expected that the RCEP would help to boost trade within the Asia-Pacific region by 2% or equivalent to USD 42 billion. Notably, the RCEP would also help to positively contribute to trade between the parties through*, inter alia,* by enhancing the elimination of non-tariff barriers, fostering rules on data security and data flows for e-commerce, as well as adopting measures for Customs facilitation.

The lower tariff rates and the anticipated removal of non-tariff barriers would help to ease market access and will provide opportunities for the RCEP parties to expand their exports within the Asia-Pacific region. It would also help to provide access to affordable and better-quality inputs for their products, thereby strengthening regional value chains. Chapter 12 on e-commerce is expected to contribute to the development of ASEAN's digital economy through assisting Micro, Small, and Medium Enterprises in seizing cross-border business opportunities through e-commerce (see *Trade Perspectives*, Issue No. 22 of 27 November 2020).

***The Philippines and Indonesia's delayed ratification of RCEP***

Pursuant to Article 20.06 of the RCEP, the Agreement enters into force vis-à-vis an individual party sixty days after that party has submitted its instrument of ratification to the ASEAN Secretariat. On 1 January 2022, the RCEP officially entered into force for ten parties, namely Australia, Brunei Darussalam, Cambodia, China, Japan, Lao PDR, New Zealand, Singapore, Thailand and Viet Nam. On 1 February 2022, the RCEP entered into for the Republic of Korea and it will enter into force for Malaysia on 18 March 2022. Two ASEAN Member States, namely Indonesia and the Philippines have yet to deposit their instrument of ratification. Myanmar has submitted its instrument of ratification in September 2021, but the ratification is still pending, as the other RCEP parties have yet to decide on Myanmar's ratification due to the political situation in Myanmar.

The delayed ratifications by Indonesia and the Philippines are based on domestic concerns with respect to the entry into effect of the trade preferences under the RCEP, notably concerns related to the lack of competitiveness of local businesses and industries vis-à-vis imported products from other RCEP parties, as well as concerns regarding a potential surge of imports. In particular, there are concerns regarding increased imports of Chinese products.

In view of these concerns, Indonesia's House of Representatives did not ratify the RCEP by 1 January 2022. Although the Commission VI on Trade, Industry, Investment, Cooperatives and Small and Medium Scale Enterprises, and State-Owned Enterprises Affairs of Indonesia's House of Representatives concluded the discussion over the ratification of RCEP on 31 December 2021, the ratification still requires approval by the House of Representatives' plenary. The Government of Indonesia intends to conclude the ratification process during the first quarter of 2022. However, following the most recent discussions within Commission VI on 31 December 2021, which concluded that Indonesia would indeed ratify the RCEP, there is still no update as to when the issue of ratification would be brought to the House of Representatives' plenary.

Meanwhile, in the Philippines, farmers, agricultural groups, and private sector associations expressed their concerns over the RCEP and urged legislators to reject or defer the decision to ratify it. The Philippines' former Undersecretary for Agriculture and Trade *Ernesto Ordonez* sided with protesters and suggested that the Philippines study India's decision to stay out of the RCEP in view of concerns over the competitiveness of local businesses and industries. Due to these concerns, the Philippines' Senate has yet to agree to the ratification of the RCEP.

***Free trade vs protectionism?***

Indonesia's and the Philippines' delayed ratifications of the RCEP show an ongoing dilemma among '*free trade*', ensuring competitiveness, and protectionism. While both Indonesia and

the Philippines have acknowledged the benefits of the RCEP for economic development and increased exports and investment, concerns over their domestic interests remain.

However, concerns over a surge of imports were already collectively acknowledged by the parties to the RCEP during the negotiations and, as a result, the RCEP includes so-called '*safety net*' provisions for the parties to safeguard their interests. These provisions include commitments on special and differential treatment for least-developed countries under Article 19.18 of the RCEP, technical cooperation and capacity building to support the Agreement's implementation, certain flexibilities and exceptions, as well as safeguard clauses under Chapter 7 of the RCEP, which would allow the parties to suspend tariff preferences in order to protect sectors negatively affected by a surge in imports. Therefore, as the RCEP already provides for such *'safety net'* provisions that would help to respond to any threat to local industries that were to suffer from trade liberalisation, not ratifying the RCEP would likely have more negative consequences for local economic development than its ratification.

***Consequences of not ratifying RCEP***

It is important for Indonesia and the Philippines to recognise that not ratifying the RCEP and isolating local businesses from economic cooperation that aims at contributing to greater regional economic integration and economic development through tariff elimination, rules harmonisation, trade facilitation, and improved transparency would be counterproductive for their economies and overall competitiveness, given that businesses will miss out on the export and investment opportunities provided by the RCEP. Economic isolationism and trade protectionism are never key drivers of economic growth, especially during the post-pandemic economic recovery.

Both the Indonesian and the Philippines' Governments should not only look at the possible adverse consequences from ratifying and implementing the RCEP, such as possible increases of imports of certain products from selected trading partners, but should also focus on the positive potential to maximise and increase local exports and investments to benefit domestic economies. To mitigate potential negative effects, Governments could introduce policies that would help to develop local Micro, Small, Medium, Enterprises and industries, in order to increase their competitiveness and utilise the opportunities offered by the RCEP.

It is noteworthy that in 2020, 56% of Indonesia's exports with a value of USD 85 million were destined for RCEP parties. Therefore, the RCEP should be beneficial for Indonesia's businesses, notably MSMEs, allowing them to increase exports to the Asia-Pacific region. In this context, Indonesia's Coordinating Minister of Economic Affairs *Airlangga Hartarto* stated that the RCEP would increase Indonesia's gross domestic product by around 0.07%. In terms of trade, it is estimated that the RCEP would contribute around USD 1 billion to Indonesia's trade surplus by 2040. Similarly, the Philippines are expected to benefit through the expansion of regional trade and investments, considering that the country's key trading partners (*i.e.,* Japan, China, Singapore) are also RCEP parties. It is projected that the RCEP would increase the Philippines' gross domestic product by 0.84%.

***The case of Myanmar***

Even though Myanmar has deposited its instrument of ratification in September 2021, the political instability following the February 2021 coup is the cause for the pending acceptance by the other parties. In light of this, a number of RCEP parties, such as the Philippines and New Zealand, have expressed their opposition towards the RCEP entering into force vis-à-vis Myanmar, notably in view of reports on human rights violations committed by the military-led Government of Myanmar.

On 17 February 2022, the Philippines' Secretary for Foreign Affairs *Teodoro Locsin Jr.* declared the Philippines' position on this matter at the ASEAN Ministerial Meeting in Cambodia. Secretary *Locsin* stated that the Philippines would not recognise Myanmar's ratification of the RCEP. Similarly, New Zealand had previously declared that it would not recognise Myanmar's

instrument of ratification. It is still unclear whether the positions maintained by New Zealand and the Philippines are legally viable and whether they would lead to Myanmar's exclusion from the RCEP. Still, if further RCEP parties were to take the same position vis-à-vis Myanmar's ratification, it might add further pressure to Myanmar to open up for dialogue or to withdraw from the RCEP. The RCEP does not provide for a mechanism to exclude a party from the agreement, but only for parties to withdraw from the RCEP. The process for withdrawal of a party is provided under Article 20.7 of the RCEP, which stipulates that a party may withdraw from RCEP by providing written notice to the Depository and that its withdrawal will take effect six months after the submission of the notice. New Zealand's and the Philippines' decision not to recognise Myanmar's instrument of ratification, once it is submitted, might mean that they also consider themselves not being bound to engage or deal with Myanmar under the RCEP. Again, this may lead to legal problems and interpretative issues.

***What's next for RCEP?***

The delayed ratification by Indonesia and the Philippines, as well as the issues with respect to Myanmar's ratification, might affect the unity of ASEAN, as RCEP was negotiated by ASEAN Member States as a single bloc, and the very economic relevance of the RCEP. The delayed ratification by Indonesia and the Philippines, due to domestic '*protectionist*' concerns, might impede ASEAN to reap the full benefits of the trade preferences under the RCEP and would, ultimately, have negative implications for the economic development and recovery for Indonesia and the Philippines, as well as for the region at large. Leaving Myanmar aside, which is obviously a complex political issue that cannot (and should not) be accommodated for mere economic interests, the attitude of Indonesia and the Philippines is disappointing and potentially damaging not only within the RCEP, but also vis-à-vis the two countries' reputation in trade circles. At a time when attracting investment, capturing regional value chains, and competing for nearshoring of certain industries (as a consequence of the *Covid* pandemic, geo-political pressure, or increased labour costs in certain countries) is critical for ASEAN Member States to recover and develop sustainably, Indonesia's and the Philippine's growing economic nationalism and protectionism sends the wrong signal to foreign investors. It would also make trading partners question the value of the two countries' commitment to trade liberalisation when signing up to preferential trade agreements and then not being able to ratify them or to implement them.

## The issue of labelling of alcoholic beverages in the EU: Black "F" *Nutri-Score* warning nutrition labels proposed for beverages containing alcohol


On 3 February 2022, the creators of the *Nutri-Score* scheme proposed, in a tweet, "*that all alcoholic beverages be marked with a black F reserved exclusively for beverages that contain alcohol even in small quantities*", along with the actual quantities of sugar, calories, and alcohol. *Nutri-Score* is a front-of-pack (hereinafter, FoP) nutrition labelling scheme, voluntarily used in a number of EU Member States. *Nutri-Score* quantifies the potentially unfavourable elements of a given foodstuff (*i.e.*, calories, saturated fatty acids, simple sugars, sodium) with the potentially favourable elements (*i.e.*, protein, fibre, and fruits, vegetables, legumes, nuts and olive or nut oil), and then with the help of an algorithm calculates a score and assigns a category from A (healthiest) to E (least healthy), which is indicated on a multicoloured label on the FoP.

The proposal of a black "*F*" *Nutri-Score* nutrition label must be seen in the broader context of the debate in the EU on the extension of nutrition labelling to alcoholic beverages and on the establishment of a harmonised mandatory FoP nutrition labelling scheme, which is meant to summarise the complex mandatory nutrition information for food provided on the back of food packages, but not for alcoholic beverages. This article reviews the respective EU rules and the current exemption of alcoholic beverages from nutrition labelling, which will likely be removed in the context of EU legislative initiatives under the *Farm to Fork Strategy* and the EU's *Beating*

*Cancer Plan*. The article also analyses how such black "*F*" *Nutri-Score* FoP labels for alcoholic beverages could be addressed under international trade law.

***EU rules on nutrition labelling and exemption for products containing alcohol***

*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) requires, in Articles 9(1)(l), 30 and 34 thereof, a nutrition declaration on the labelling of almost all pre-packaged foodstuffs. It also demands that this label include the energy value, as well as the amounts of fat, saturates, carbohydrate, sugars, protein and salt, expressed (per 100 g or per 100 ml) in tabular format (if space permits), to allow consumers to make informed and health-conscious choices. Article 16(4) of the FIR currently exempts alcoholic beverages containing more than 1.2% alcohol by volume from displaying the nutrition declaration.

In the current debate regarding the extension of nutrition labelling to alcoholic beverages, the European Commission (hereinafter, Commission) notes that "*this results in a reduced level of consumers' awareness as regards the content and the nutritional composition of alcoholic beverages, thus hampering consumers informed choices as regards a category of food products whose excessive consumption needs reducing with a view to tackle ensuing harm*".

Certain EU Member States have already introduced legislation on mandatory nutrition labelling, particularly for alcoholic beverages. Austria's *Wine Act 2009* requires the labelling of the amount of residual sugar (*i.e.*, sugar of the grapes or must that has not fermented into alcohol after the natural or intentional fermentation) for certain wine products. Ireland's *Public Health (Alcohol) Act 2018* requires the indication of the quantity in grams of alcohol, and the energy value expressed in kilojoules and kilocalories of each alcoholic product (see *Trade Perspectives*, Issue No. 2 of 26 January 2018).

***Report on nutrition declaration for alcoholic beverages and the industry's proposal***

The Commission's 2017 Report regarding the mandatory labelling of the list of ingredients and the nutrition declaration of alcoholic beverages, which was mandated by the FIR, concluded that "*no objective grounds justify the absence of information to consumers on ingredients and nutrition information on alcoholic beverages*". In light of the proliferation of voluntary initiatives by the industry to provide consumers with such information, the Commission invited the industry to engage in a self-regulatory approach (see *Trade Perspectives*, Issue No. 6 of 24 March 2017).

On 12 March 2018, the alcoholic beverages industry submitted a *Joint Proposal* to the Commission, according to which, essentially, the nutritional information would be given to consumers off-label and/or on-label. Importantly, for the *Joint Proposal*, the industry did not reach agreement on the long-standing dispute over how to inform consumers about the number of calories (or energy) contained in alcoholic beverages. The industry believes that the legally required declaration "*per 100ml*" of the FIR is not suitable for most alcoholic beverages (see *Trade Perspectives*, Issue No. 17 of 21 September 2018).

*Brewers of Europe*, a trade association representing European breweries, signed, on 5 September 2019, a *Memorandum of Understanding* and committed to label ingredients and energy values on all beer bottles and cans in the EU by 2022. On 30 September 2021, the EU's wine and spirits sectors launched a new e-label platform, which provides consumers with information on ingredients, nutrition information, responsible drinking guidelines, and sustainability of wine and spirits on the Internet (see *Trade Perspectives*, Issue No. 18 of 8 October 2021). Regarding wine, on 23 June 2021, the European Parliament and the Council of the EU reached provisional political agreement on the EU's new Common Agricultural Policy (CAP) in the context of which, *inter alia*, specific rules were agreed for the wine sector, including new rules for wines and aromatised wine products, requiring wine producers to indicate the energy value of their products, and ensuring that full nutrition and ingredients information is provided on the label or by electronic means.

With respect to voluntary labelling, the Commission notes that, "*while voluntary labelling practices developed by various industry sectors aim to provide information that makes consumers choices easier, they have resulted in a currently fragmented landscape in the absence of uniform regulatory requirements. This creates an uneven playing field for operators and results in consumers' expectations being only partly addressed*".

***EU Beating Cancer Plan and consultation on labelling of alcoholic beverages***

Before the industry's *Joint Proposal* was developed, the Commission had stated that, if the industry's self-regulating proposal were not satisfactory, it would launch an impact assessment to review all available options. Thus, the Commission published on 24 June 2021 its Inception Impact Assessment on the labelling of alcoholic beverages, outlining the Commission's initial analysis of the problems, policy objectives, and different solutions, as well as the likely impacts. A public consultation is open until 7 March 2022. This initiative complements, with respect to the labelling of all alcoholic beverages, the ongoing initiative related to the FIR, which seeks to harmonise mandatory FoP nutrition labelling, extend origin or provenance indications to certain products, and revise EU rules on date marking.

On 3 February 2021, the Commission adopted *Europe's Beating Cancer Plan*, aiming at cancer prevention, including by reducing harmful alcohol consumption. Most recently, on 16 February 2022, the European Parliament's plenary adopted the report *Strengthening Europe in the fight against cancer*, which underlines that harmful alcohol consumption is a risk factor for cancer. While the draft report called for *"improving the labelling of alcohol beverages to include health warning labels and (…) nutritional information*", the adopted text has been watered down and now refers to "*moderate and responsible drinking information*". There is a fundamental difference between harmful and moderate consumption and between information on moderate and responsible consumption and health warnings.

***Simplified presentation of nutrition information and nutrition warning labels***

In early February 2022, one of the developers of *Nutri-Score* scheme confirmed that *Nutri-Score* is looking to label with a black "*F"* all beverages that contain alcohol even in small quantities, to warn against their consumption, stating that "*All alcoholic beverages are demonstrated, among them wine, to have deleterious effect on health even low doses, especially for cancers*". The nutrition warning label is reportedly designed to "*fight the current trivialization of alcohol consumption and the difficulties to understand the message that alcohol abuse is dangerous to health*".

Nutrition warning labels have been introduced in France, where since 2007, it is mandatory for alcoholic beverages either to include the following message: "*Consumption of alcoholic drinks during pregnancy, even in small amounts, may have serious consequences on the child's health*", or to use a pictogram. In Slovenia, labels of alcoholic beverages must include a warning that they are not suitable for children. In other jurisdictions around the world, for example in Chile, nutrition warning labels in the form of black stop signs indicate that the food is high in fats and/or sugar. Other South American countries (*e.g.*, Brazil, Peru, and Uruguay), as well as Canada and Israel, have developed or are developing similar alert schemes, which are, however, still novel in the food sector, but are part of a trend of public policies aimed at tackling lifestyle risks by conveying certain information to consumers. While warning messages that reduce the visual appeal of the packaging of products are ubiquitous in the tobacco sector, these types of messages are now also gradually being extended to the alcohol and food sectors.

According to Article 35(1) of the FIR, the mandatory nutrition declaration may be complemented by a voluntary repetition of the energy value and the amount of nutrients in the principal field of vision (known as the "*front-of-pack*" or FoP). For this repetition, other forms of expression and/or presentation (*e.g.*, graphical forms or symbols) may be used on the FoP. Such voluntary nutrition labelling may not be given in isolation, but must be provided in addition

to the full mandatory ("*back of pack*") nutrition declaration. According to Article 35 of the FIR, additional forms of the nutrition declaration may be used by food business operators or recommended by EU Member States, provided that they comply with the criteria set out in the FIR. To that end, these labels must be objective, non-discriminatory and must not create obstacles to the free movement of goods. Supplementary forms of expression of the nutritional content of the food must be based on sound and scientific research and should not mislead consumers but aim at facilitating consumer understanding of the contribution or importance of the food product to the energy and nutrient content of a diet.

***Nutrition labels and warning labels under international trade rules***

At the international level, the *Codex Guidelines on Nutrition Labelling* state that "*the nutrition declaration should be mandatory except where national circumstances would not support such declaration*". Mandatory FoP warning labels, on alcoholic beverages, if required by legislation, may come under the scrutiny of international trade law. According to Article 2.2 of the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement), WTO Members must ensure that technical regulations do not create unnecessary obstacles to international trade. For this purpose, technical regulations must not be more trade-restrictive than necessary to fulfil a legitimate objective (*e.g.*, the protection of human health). Arguably, the objective of FoP alcohol warning labels could be addressed by more effective and less trade-restrictive public policies. In particular, if there is an obligation to provide nutritional information, the rationale for imposing additional warnings is not clear. Other less trade-restrictive information measures (such as launching campaigns to encourage the population to eat healthily and promoting physical activity programmes) also appear to be available.

Article 2.4 of the TBT Agreement provides that technical regulations must be based on the relevant international standards. Section 5 of the *Codex Guidelines on Nutrition Labelling* recommends, in relation to supplementary nutrition information, that it should intend to increase consumers' understanding of the nutritional value of their food and that it should assist in interpreting the nutrient declaration. The *Codex Guidelines on Nutrition Labelling* state that the information contained in the nutrient declaration "*should not lead consumers to believe that there is exact quantitative knowledge of what individuals should eat in order to maintain health, but rather to convey an understanding of the quantity of nutrients contained in the product"*. Additionally, the manner in which the legitimate public health objective is pursued appears to be incompatible with the list of prohibited claims under section 3 of the *Codex General Guidelines on Claims*. For instance, Section 3.5 of these guidelines prohibits "*claims which could give rise to doubt about the safety of similar food or which could arouse or exploit fear in the consumer*". Arguably, simply adding a black "*F*" category to the *Nutri-Score* label does not provide any meaningful information to consumers and only suggests that the product is even worse than a product labelled with an "*E*", even if it contains only marginal amounts of alcohol. Black "*F*" *Nutri-Score* warnings risk demonising some foods, whose consumption in moderation can be part of a healthy diet.

***Stakeholder positions***

Representatives from the wine sector reportedly called the black "*F*" *Nutri-Score* proposals for alcoholic beverages "*insulting*" and an "*affront to science and the wine sector*". The President of the Italian wine federation *Federvini* declared that "*We learned with amazement and bewilderment the attempt to apply in the worst possible way a discriminatory, penalizing and fundamentally wrong system like the Nutri-Score also to alcoholic beverages*". The European consumer organisation BEUC remarked to be "*a bit surprised by the controversy (…) when, at the EU level, we are yet to obtain that alcoholic beverages simply carry a nutritional declaration and list of ingredients – like all other foods and drinks. We are not aware of any EU-level discussions on extending front-of-pack nutrition labelling to alcoholic drinks*". *spiritsEUROPE*, representing associations of spirits producers, as well as leading multinational companies, encouraged the Commission to reflect the recently negotiated rules, which include a mix of on-label and on-line information, on consumer information for wine in the context of the CMO regulation under the CAP reform in the rules on the labelling of alcoholic beverages.

***Conclusion and outlook***

The extension of mandatory nutrition labelling to all alcoholic beverages appears inevitable. However, specific FoP warning labels like the black "*F*" *Nutri-Score* for all beverages containing alcohol appear difficult to agree with, in view of the fact that moderate alcohol consumption is not scientifically condemned. The EU's alcoholic beverages sectors are increasingly preparing for the adoption of mandatory food labelling and information rules for the wine sector under the new CAP, the review of the FIR, and different policy initiatives like the EU's *Beating Cancer Plan* and the EU's *Farm to Fork Strategy,* which all address the matter of nutrition labelling. For the wine sector, indicating the energy value of the products, and ensuring full nutrition and ingredients information on the label or by electronic means, will be possible. It is a good example of how industry sectors can address voluntarily, for example by electronic means, the matter of nutrition and ingredient labelling, and help designing the rules before they are imposed by regulators. All interested stakeholders should consider participating in the public consultation on the labelling of alcoholic beverages, which is open until 7 March 2022, and closely follow this process.

## Recently adopted EU legislation

### Trade Law

- *Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*

- *Council Decision (CFSP) 2022/335 of 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*

- *Council Implementing Regulation (EU) 2022/300 of 24 February 2022 implementing Article 8a of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus*

- *Commission Implementing Regulation (EU) 2022/305 of 24 February 2022 amending Annexes V and XIV to Implementing Regulation (EU) 2021/404 as regards the entries for the United Kingdom and the United States in the lists of third countries authorised for the entry into the Union of consignments of poultry, germinal products of poultry and fresh meat of poultry and game birds ( 1 )*

- *Council Decision (CFSP) 2022/327 of 25 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*

- *Council Regulation (EU) 2022/328 of 25 February 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*

### Trade Remedies

- *Commission Implementing Regulation (EU) 2022/301 of 24 February 2022 extending the definitive countervailing duty imposed by Implementing Regulation (EU) 2020/776 on imports of certain woven and/or stitched glass fibre fabrics ('GFF') originating in the People's Republic of China ('the PRC') to imports of GFF consigned from Morocco, whether declared as originating in Morocco or not, and terminating the investigation*

*concerning possible circumvention of the countervailing measures imposed by Implementing Regulation (EU) 2020/776 on imports of GFF originating in Egypt by imports of GFF consigned from Morocco, whether declared as originating in Morocco or not*

- *Commission Implementing Regulation (EU) 2022/302 of 24 February 2022 extending the definitive anti-dumping duty imposed by Implementing Regulation (EU) 2020/492, as amended by Implementing Regulation (EU) 2020/776, on imports of certain woven and/or stitched glass fibre fabrics ('GFF') originating in the People's Republic of China ('the PRC') to imports of GFF consigned from Morocco, whether declared as originating in Morocco or not, and terminating the investigation concerning possible circumvention of the anti-dumping measures imposed by Implementing Regulation (EU) 2020/492 on imports of GFF originating in Egypt by imports of GFF consigned from Morocco, whether declared as originating in Morocco or not*

## Food Law

- *Commission Implementing Regulation (EU) 2022/320 of 25 February 2022 concerning the authorisation of expressed mandarin essential oil as a feed additive for poultry, pigs, ruminants, horses, rabbits and salmonids ( 1 )*

- *Commission Implementing Decision (EU) 2022/323 of 22 February 2022 on the unresolved objections regarding the conditions for granting an authorisation for the biocidal product Sojet in accordance with Regulation (EU) No 528/2012 of the European Parliament and of the Council (notified under document C(2022) 973) ( 1 )*

- *Commission Implementing Decision (EU) 2022/325 of 24 February 2022 amending Implementing Decisions (EU) 2015/698, (EU) 2017/2448, (EU) 2017/2452, (EU) 2018/1109, (EU) 2018/1110, (EU) 2019/1304, (EU) 2019/1306 and (EU) 2021/1388 as regards the authorisation holder and its representative in the Union for the placing on the market of products containing, consisting of, or produced from certain genetically modified organisms (notified under document C(2022) 1049) ( 1 )*

- *Commission Implementing Decision (EU) 2022/326 of 24 February 2022 amending Implementing Decision (EU) 2019/961 authorising a provisional measure taken by the French Republic in accordance with Article 129 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) to restrict the use and the placing on the market of certain wood treated with creosote and other creosote-related substances (notified under document C(2022) 1074) ( 1 )*

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