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Please note that Trade Perspectives© will take an editorial break during the WTO’s August recess and will resume its fortnightly publication schedule on 5 September 2021. We thank you for your continued interest in Trade Perspectives© and look forward to starting again with renewed energy and enthusiasm our dialogues on international trade and food law as of this Autumn.

The Trade Perspectives© Team

The EU and New Zealand reach an ‘*agreement in principle*’ for their Free Trade Agreement, a first for the EU’s new approach on trade and sustainable development

On 30 June 2022, the EU and New Zealand reached an ‘*agreement in principle*’ and concluded their trade negotiations for the EU-New Zealand Free Trade Agreement (hereinafter, EU-New Zealand FTA). Notably, according to European Commission Vice President and European Commissioner for Trade *Valdis Dombrovskis*, the EU-New Zealand FTA contains “*the most ambitious sustainability commitments in any trade agreement ever*”, being the first EU-negotiated FTA that is based on the EU’s new approach on Trade and Sustainable Development (hereinafter, TSD). The Agreement provides steps forward regarding trade and sustainability. However, some stakeholders have raised concerns on its impact on certain sectors, such as dairy and kiwifruit trade.

Commitment towards trade liberalisation and sustainability

In October 2015, the EU and New Zealand announced their intention to negotiate a preferential trade agreement (hereinafter, PTA) and, on 22 May 2018, the Council of the EU (hereinafter, Council) authorised the European Commission (hereinafter, Commission) to begin trade negotiations with New Zealand, adopting the relevant negotiating directives (see *Trade Perspectives*, Issue No.11 of 1 June 2018). Negotiations between the EU and New Zealand began at a quick pace with both parties committed to conclude an ambitious trade agreement.

In 2020, the *Covid-19* pandemic briefly slowed down negotiations and, in October 2020, New Zealand expressed its disagreement with the EU's market access offer for agri-food products, in particular with the tariff-rate quotas (hereinafter, TRQs) offered by the EU for meat and dairy products. Additionally, despite the commitments from both parties to strengthen the agreement's provisions on trade and sustainable development, New Zealand appeared to pursue more ambitious commitments than the EU, aiming at liberalising '*green*' goods and services (for instance goods and services that pursue the protection of the environment and the management of natural resources or are environmentally friendly) and at eliminating subsidies for fossil fuels. Consequently, the pace of negotiations slowed down and delayed the conclusion of the agreement. In June 2022, the negotiations between the EU and New Zealand regained *momentum* and intensive negotiations on a new market access offer were held. On 30 June 2022, the EU and New Zealand announced the '*agreement in principle'* and the conclusions of the trade negotiations.

The EU-New Zealand FTA

The EU-New Zealand FTA is the first of a new generation of EU-negotiated FTAs. The President of the European Commission *Ursula von den Leyen* noted that the conclusion of negotiations was "*a historic moment*" for the cooperation between the EU and New Zealand and that the EU and New Zealand had concluded "*a solid and a modern trade agreement*". New Zealand's Prime Minister *Jacinda Ardern* stated that the Agreement "*contains ground-breaking commitments on the environment, labour rights, gender equality, and a chapter on Trade and Sustainable Development, as well as on Maru trade and economic cooperation, which is very important for New Zealand*". Both parties concurred that the Agreement had been concluded at a key moment in which their economies are recovering from the *Covid-19* pandemic and are, at the same time, facing disruptions caused by Russia's war in Ukraine.

On the basis of the EU-New Zealand FTA, New Zealand will remove tariffs on all EU exports to New Zealand at the moment of entry into force. The EU will not fully liberalise tariffs, but will remove or reduce import tariffs for key New Zealand exports from the day of entry into force, including for kiwifruit and honey. With respect to sensitive products, the EU-New Zealand FTA foresees TRQs with a reduced tariff. Under the TRQs, the tariff reduction would apply from the entry into force, but the maximum quantity of the TRQs would only be reached between six to seven years following the entry into force.

The EU-New Zealand FTA will provide TRQs for imports into the EU for a number of agricultural products, such as Fresh chilled sheep meat:13,300 metric tonnes to be reached on year six (0% tariffs); Frozen sheep meat: a maximum of 24,700 metric tonnes to be reached on year six (0% tariffs); Milk powder: 15,000 metric tonnes to be reached on year seven (20% of the most favoured nation (hereinafter, MFN) rate); Dairy processed agricultural products (PAPs) and High Protein Whey: 3,500 metric tonnes to be reached on year six (0% tariffs); Sweetcorn: 800 metric tonnes from the entry into force of the agreement (0% tariffs); and Ethanol: 4,000 metric tonnes form the entry into force of the agreement (0% tariffs). For beef, butter and cheese, the Agreement will add a TRQ in addition to the already granted quota under the WTO country-specific quotas.

First test for the EU's new approach on trade and sustainable development

The EU-New Zealand FTA provides various novelties linked to sustainability. One of the most relevant novelties in the Chapter on Trade and Sustainable Development is the inclusion of sanctions where there has been a failure to "*respect, promote and realise the principles concerning the fundamental rights at work, which are the subject of the fundamental ILO Conventions*", namely freedom of association, abolition of child labour, elimination of forced labour and the elimination of discrimination in respect of employment and occupation, and "*to effectively implement the Paris Agreement*". The agreement is the first EU trade agreement that includes such novel approach.

Importantly, unlike in previous EU trade agreements, in case a dispute arises related to the implementation of commitments under the TSD Chapter, the parties would have recourse to the procedures under the Dispute Settlement Chapter and not rely on a dedicated mechanism. Parties would follow the general rules of the dispute settlement mechanism provided in the Dispute Settlement Chapter of the EU-New Zealand FTA. However, the Dispute Settlement Chapter also provides specific rules or procedures applicable to disputes related to the TSD Chapter. For instance, under Article X.3 on '*Consultations*' of the Dispute Settlement Chapter, parties must take into account "*information from the ILO* [International Labor Organization] *or relevant bodies or organisations established under Multilateral Environmental Agreements (MEAs)*". Regarding the composition of a panel in disputes under the TSD Chapter, the Agreement establishes that panellists "*shall have specialised knowledge of or expertise in labour or environmental law, issues addressed in the TSD Chapter, or the resolution of disputes arising under international agreements*" (Article X.7 of the Dispute Settlement Chapter).

For the first time, a compliance stage is foreseen for TSD dispute settlement procedures. The TSD Sub-Committee established by the Agreement would be tasked with overseeing compliance. If the panel were to find a breach of the commitments under the TSD Chapter, the defendant would be required to take the necessary measures to comply with the panel report and notify the complaining party of the measures taken. In case of non-compliance, the complaining party may request consultations to determine "*an acceptable compensation*". In case the defendant were to refuse to enter into consultations, or in case no acceptable solution were to be reached within 20 days of entering into consultations, the complaining party could send a written notification to the defendant stating that "*it intends to suspend the application of obligations under the covered provisions*". It is important to note that sanctions and compensation would only apply in case of a breach of provisions on the core labour rights (Article X.3(3) of the TSD Chapter) and trade and climate change (Article X.6(3) of the TSD Chapter), and in the event that either party carries out an activity "*to refrain from any action or omission which materially feats the object and purpose of the Paris Agreement*". No other provisions in the TSD Chapter would be sanctionable. Additionally, the TSD Chapter includes dedicated provisions on trade and fossil fuel subsidy reform, biological diversity, forests, sustainable management of fisheries and aquaculture, investment supporting sustainable development, and responsible conduct and supply chain management.

The EU-New Zealand also introduces other novelties linked to sustainability. The Agreement will eliminate tariffs on environmental goods and services, which aim at "*achieving environmental and climate goals, by preventing, limiting, minimising or remediating environmental damage to water, air and soil and by contributing to the dissemination of technologies that serve to mitigate climate change*" and at "the transition to a circular economy". Additionally, the Agreement introduces a Sustainable Food System Chapter in which parties agreed to cooperate on areas such as food production methods, efficient use of natural resources, and security and resilience of food supply chains and trade in times of international crisis.

Some steps forward, but also some missed opportunities

The conclusion of the EU-New Zealand FTA has been welcomed with mixed reactions. While certain companies, such as New Zealand's *Zespri*, which is the world's largest marketer of kiwifruit, and broader trade associations, such the Confederation of European businesses *BusinessEurope*, welcomed the EU-New Zealand FTA, the EU's organisation of farmers and agri-cooperatives *Copa-Cogeca*, the European kiwifruit industry and the *European Dairy Association* expressed their disappointment with the agreement.

The *European Dairy Association* (EDA) stated, in a statement on 30 June 2022, that "*any trade agreement must be tailored in a fair trade and level playing field spirit to achieve at the end a win-win situation*". However, EDA stated that, "*for milk and dairy, this was a near to impossible task from the outset and the outcome does give a unilateral advantage to the NZ dairy industry, pushing the EU concessions to the absolute limit*". The EDA noted that the dairy sector in both

parties is very different. The EDA stated that, while 85% of New Zealand's milk is processed by a single dairy producer, the European dairy sector is rather characterised by small sized, regional dairies. Therefore, it called upon the Commission to assure that the management of the TRQs be established in a way that does not provide even more advantages to New Zealand's diary sector. The EDA stated that the European dairy sector would continue "*being resilient and competitive*" and prepare for new tougher market conditions.

Earlier in the negotiations, the EU kiwifruit industry had also been hopeful to make progress on long-standing issues related to trade in kiwifruit. In New Zealand, *Zespri Group* Limited (hereinafter, Zespri), which is a State Trading Enterprise notified by New Zealand to the World Trade Organisation, maintains a monopoly on the marketing of kiwifruit. In particular, New Zealand expressly prohibits any operator other than *Zespri* from exporting kiwifruit to all markets other than Australia, except where authorised through so-called collaborative marketing arrangements by *Kiwifruit New Zealand*, a dedicated and Government-controlled regulatory board (for a detailed analysis, see *Trade Perspectives*, Issue No. 11 of 3 June 2016). Such export restriction, combined with New Zealand's phytosanitary requirements on the importation of kiwifruit varietals into its territory, which are considered overly restrictive and *de facto* discriminatory against non-*Zespri* varietals, effectively insulates New Zealand's kiwifruit market, and does not offer reciprocal conditions of market access to New Zealand as the very liberal ones accorded by the EU under WTO law to *Zespri*'s kiwifruit.

This has long been an issue of grievance for the EU kiwifruit industry, particularly since such practices ultimately also allow *Zespri*'s kiwifruit to distort the conditions of competition on the EU market, where it has a dominant position during the six-month period when production comes from the southern hemisphere (*i.e.*, primarily New Zealand and China) and can influence market choices also during the six months when production takes place in the northern hemisphere (*i.e.*, mainly in the EU, especially in Italy and Greece). These trade-restrictive and anti-competitive practices of New Zealand and *Zespri* have long been known by the European Commission and the EU-New Zealand FTA was arguably the perfect (if not sole) opportunity for the EU to address them. However, it appears that the EU has let pass such opportunity and totally disregarded the pleas from the EU industry.

Sadly, it appears that the EU negotiators may have taken the easy way forward in the negotiations and decided not to fight for an important EU offensive interest in the agricultural sector in order not to have to make other inconvenient and politically costly concessions to New Zealand in the agricultural sector, which for the EU is notoriously sensitive. In a paradoxical turn of events, the EU even decided to further open to competition its kiwifruit market. In fact, the Agreement not only did not address the many instances of discrimination by New Zealand of EU kiwifruit varietals, but incredibly, has committed the EU to grant duty-free imports into the EU for New Zealand's kiwifruit. Hopefully, the EU Parliament and EU Member States will have the opportunity to address some of these shortcomings during the discussions for the ratification of the EU-New Zealand FTA.

The road ahead

The text of the EU-New Zealand FTA has yet to go through the usual legal revision (*i.e.*, '*legal scrubbing*') and will then be translated into all official EU languages. Thereafter, the Commission will submit the Agreement for signature and conclusion to the Council of the EU. Once adopted by the Council, the EU and New Zealand can sign the Agreement and the text will then be submitted to the European Parliament for its consent. Following the consent by the European Parliament, and once New Zealand has completed its own ratification procedures, the Agreement will enter into force.

Untangling the legislative procedure for the CBAM

On 28 June 2022, the Council of the EU (hereinafter, Council) adopted its negotiating position on the '*Fit for 55*' package, which includes the proposal for a *Regulation of the European*

Parliament and of the Council establishing a Carbon Border Adjustment Mechanism (hereinafter, CBAM). This came on the heels of the European Parliament's adoption of its position on the CBAM just a week earlier. Taken collectively, the completion of these steps would tend to provide greater optimism for an eventual CBAM. However, one would be remiss to overlook the arduous legislative process that accompanies such an important piece of legislation, particularly one that portends a significant impact on international trade. This article delves into the procedural aspects of the CBAM, contrasting, where relevant, the ordinary legislative procedure with that prevailing in the case of CBAM. Relatedly, the article will examine the source of substantive discord and will assess the next steps to be taken in order to move CBAM from aspiration to enacted legislation.

Ordinary legislative procedure

The ordinary legislative procedure is the general procedure of the EU to adopt legislation. It begins with the adoption of a European Commission's (hereinafter, Commission) proposal. Then, according to this procedure, the European Parliament and the Council, acting as equal co-legislators, have up to three readings to agree on a Commission's proposal. After the proposal, both the European Parliament and the Council have to adopt a position on the proposed text. Then, interinstitutional negotiations take place (*i.e.*, between the Commission the European Parliament and the Council) through a process known as '*trialogues*'. The co-legislators have the possibility to agree on a compromise text and, thus, to conclude the procedure, at any reading. The Conciliation marks the third and final step of the ordinary legislative procedure and only takes place if the Council does not agree with the amendments adopted by the European Parliament at the second reading. If the Conciliation Committee does not agree on a joint text, the legislative act cannot be adopted and the procedure ends. However, if a joint text is approved, the text is submitted to the Parliament and to the Council for a third reading.

Steps taken by the Commission

In 2009, France's then President *Nicolas Sarkozy* led a campaign aimed at introducing carbon tariffs at EU borders by creating a system called "*Carbon inclusion mechanism*", which would have required importers of goods manufactured outside Europe to buy pollution permits from the EU's *Emission Trading System* (hereinafter, ETS) (see *Trade Perspectives*, Issue No. 17 of 18 September 2020). Nevertheless, France's request to introduce a carbon tariff to be levied at the EU-borders encountered the obstacle of unanimity, which was required in the Council in order to impose such measure.

In 2020, the Commission held a public consultation, aimed at involving interested stakeholders in the EU law-making process of the CBAM and conducted an impact assessment, which was published in 2021. The Commission took into account the outcome and conclusions of both procedures for its proposal. On 14 July 2021, the Commission presented the '*Fit for 55*' package of proposals, which includes the *Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Carbon Border Adjustment Mechanism*.

The creation of the CBAM was motivated, in large part, on the concern that companies based in the EU could be faced with competition from products coming from outside the EU, which are less '*green*', but more competitive, due to application of the EU's ETS only on products manufactured in the EU. Indeed, the EU's ETS, established by *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC,* pursues the objective of reducing greenhouse gas emissions (hereinafter, GHG) in a cost-effective way. The architecture of the EU's ETS is based on the '*cap-trade system*' principle, which involves setting a certain cap on the amount of GHGs that specific sectors may emit. The EU's ETS could be described as a '*carbon market*'. In the EU's ETS, allowances are allocated through auctions and can be sold or bought by companies. Certain sectors benefit from the allocation of free allowances. However, this mechanism does not apply to products manufactured in third countries and imported into the EU.

Under the proposed CBAM, EU importers would be required to buy carbon certificates corresponding to the carbon price that the imported products would have paid under the EU's carbon prices rules. However, if a non-EU producer demonstrates that it has already paid a price for the carbon used in the production of the imported goods in a third country, the costs incurred can be fully deducted. The CBAM aims at reducing the risk of so-called '*carbon leakage*', by encouraging producers in non-EU countries to '*green*' their production processes. Carbon leakage refers to the phenomenon of transferring production to other countries with less strict emissions regulation largely for reasons of the costs related to environmental policies. This phenomenon obviously leads to an increase in emissions.

The Commission's Proposal states that the CBAM would be phased in gradually and would initially cover only certain selected goods at high risk of carbon leakage, namely iron and steel, cement, fertiliser, aluminium, and electricity. A reporting system would apply from 2023 for those products, with the scope of facilitating the gradual implementation of the mechanism, and importers would start paying a financial adjustment in 2026. The revenues from those payments would contribute to the EU's budget. The proposed CBAM aims at mirroring the EU's ETS. Free allowances are not foreseen in the proposed CBAM Regulation. According to the Commission's Proposal, free allowances for EU exports would still be provided under the EU's ETS during the transition period of the CBAM between 2023 and 2025. During this period, third country exporters would not be required to purchase CBAM certificates, but only to report their carbon emissions. The free ETS allowances on the EU market would be gradually eliminated by the end of the CBAM's transition period.

Legislative train in the Parliament

In 2021, the European Parliament's Committee on the Environment, Public Health and Food Safety (hereinafter, ENVI Committee) prepared and adopted a report entitled '*Towards a WTO-compatible EU Carbon Border Adjustment Mechanism*'. The document was not binding, and could not be considered as a legislative proposal, which can only come from the Commission, but it did express the general position of the European Parliament on the CBAM. In November 2021, the ENVI Committee and the European Parliament's Committee on International Trade (hereinafter, INTA Committee) referred some 500 possible amendments to the Commission's Proposal to certain associated committees' amendments. The amendments proposed by the various political groups pertained, *inter alia*, to: 1) Whether the sectoral coverage of CBAM should expand beyond organic chemicals, hydrogen, and polymers; 2) The CBAM's application to direct and indirect emissions; 3) Potential exemptions for least developed countries; and 4) The period of time to phase out the ETS free allowance allocation. While the ENVI Committee proposed to apply the CBAM before 2025 and immediately phase out free allowances, the INTA Committee proposed to apply free allowances for EU industries without a similar mechanism for products imported from third countries during the period from 2026 to 2029.

In May 2022, the ENVI Committee adopted its report on the regulation establishing the CBAM, which was then tabled in the plenary. However, on 8 June 2022, the European Parliament rejected the Draft Report on the revision to the EU's ETS and, as a consequence, the vote on the Draft Report on the CBAM was postponed. On 14 June 2022, the three largest political groups in the EU (*i.e.*, the centre right European People's Party, the centre left Socialists and Democrats, and liberal Renew Europe group) reached a new provisional agreement on the proposed CBAM.

Finally, on 22 June 2022, the European Parliament adopted its position on the proposed regulation. Members of the European Parliament agreed on a number of changes to the Commission's Proposal, including broadening the scope of the CBAM to include coverage of organic chemicals, plastics, hydrogen and ammonia; phasing-in of the CBAM with its application from 1 January 2023 and a transitional period until the end of 2026; and ending the system of free allowances in the EU's ETS by 2032, as well as recognising the need for a centralised EU CBAM authority. The European Parliament also expressed the view that

revenues generated by the sale of the CBAM certificates should go to the EU budget and the EU should provide at least equivalent financial support to least developed countries in the process of decarbonisation of manufacturing industries.

Council's stages

In March 2021, an op-ed was published by Ministers from nine EU Member States: Austria, Czech Republic, Denmark, France, Lithuania, Luxemburg, the Netherlands, Slovakia and Spain. In the op-ed, these countries called on the Commission to put forward a concrete, WTO-compatible, CBAM proposal by the Summer, and encouraged the Commission to put forward a CBAM proposal that would ensure non-discrimination and a good functioning with the EU's ETS.

In March 2022, the Council agreed on its negotiating mandate. Inter alia, it pushed towards greater centralisation of the CBAM governance; a minimum threshold, exempting consignments with a value of less than EUR 150; and the promotion of stronger cooperation with third countries. In addition, an *Ad Hoc Working Party on the Carbon Border Adjustment Mechanism CBAM* was established to deal with the issue.

On 28 June 2022, the Council adopted its negotiating position on the CBAM. Its decision was in favour of a progressive ending of free allowances for the sectors concerned over a ten-year period between 2026 and 2035, in parallel to the gradual phase-in of the CBAM. Moreover, according to the Council, the scope of the mechanism should be expanded to aluminous cement, other articles of iron and steel, and some other aluminous products such as aluminium structures, reservoirs and cans.

WTO compatibility and economic implications

Since it announced its intention to introduce a CBAM, the Commission has insisted that it would design a WTO-compatible instrument. It is still too early to fully determine the consistency of the CBAM with WTO rules. Indeed, the legal viability of this policy tool under WTO law may only entirely crystalise further down the legislative and implementation process. For the time being, however, it is possible to identify the main points of potential frictions between the proposed CBAM and WTO rules, notably the General Agreement on Tariffs and Trade (hereinafter, GATT) 1994 and the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, SCM). In addition, the CBAM may also face obstacles related to obligations contained in the Agreement on Technical Barriers to Trade (hereinafter TBT Agreement).

With respect to the GATT, it is not inconceivable that assignation of carbon emissions to certain products, while *de jure* non-discriminatory, might lead to claims of *de facto* discrimination where competing '*like*' products were considered to have less/more carbon emissions. This is particularly true where: either (i) the negatively impacted '*like*' product(s) hail from outside the EU, while the positively impacted '*like*' products derive from abroad (which would potentially constitute a national treatment violation in violation of Article III:4 of the GATT); or (ii) where the negatively impacted '*like*' products generally hail from one or more WTO Members, while positively impacted '*like*' products come from a different WTO Member or a differing set of WTO Members (which may constitute a violation of the Most-Favoured Nation (MFN) requirement contained in, *inter alia*, Article I:1 of the GATT). Similar issues might confront the CBAM if it (or aspects of it) were to be deemed a 'technical regulation' (or technical regulations). For example, Article 2.1 of the TBT Agreement precludes the provision of less favourable treatment to like products on both an MFN and national treatment basis. Moreover, the TBT Agreement places additional obligations on technical regulations, such as the requirement of Article 2.2 that a technical regulation be no more trade restrictive than necessary to fulfil a legitimate objective or the obligation under Article 2.4 that a measure be based on relevant international standards. In sum, the CBAM faces many potential hurdles within WTO law.

From the preparatory phase to future developments

Looking back at the steps taken during this legislative procedure, the tortuosity of the CBAM's path is evident. Indeed, the CBAM has been shaped by a transparent procedure that enables stakeholders to bring their concerns and points of view to the legislator. The EU's public consultations and impact assessments have also provided opportunities for all parties that stand to be impacted by the CBAM to engage with the decision-makers. The steps expected to be taken in the coming months will be the entrance into '*trialogue*' negotiations aiming at finding a political agreement in the first reading phase. The CBAM remains an innovative policy tool to address third country GHG emissions. It should be noted that such mechanism has seemingly started to gain some *momentum* in other jurisdictions, as well. Therefore, it is an instrument worth understanding in detail and following closely as it is progressively defined by the EU.

The Court of Justice of the EU rules against Denmark for permitting exports of "*Feta*" cheese to third countries outside the EU

In Case C-159/20, an action under Article 258 of the Treaty on the Functioning of the European Union (hereinafter, TFEU) directed against Denmark for failure to fulfil obligations under *Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs*, following an infringement proceeding initiated by the European Commission (hereinafter, Commission), supported by Greece and Cyprus, the Court of Justice of the European Union (CJEU) delivered its judgement on 14 July 2022. The Court held that the use of the Protected Denomination of Origin (hereinafter, PDO) "*Feta*" to designate products produced in the territory of the EU, which do not comply with the product specifications for that PDO, undermines the objectives of *Regulation (EU) No 1151/2012* even if those products are intended for export to third countries outside the EU. The article provides an overview of the case and the judgment, as well as its impact on the EU's exports of products that do not meet the PDO requirements but are labelled as PDOs to third countries outside the EU that do not have a reciprocal protection of EU's PDOs in place.

The registration of "*Feta*" as a PDO and the Danish production of "*Feta*" cheese

The name "*Feta*" was registered as a PDO in 2002 by *Commission Regulation (EC) No 1829/2002 amending the Annex to Regulation (EC) No 1107/96 with regard to the name "Feta"*. Since then, the name "*Feta*" may only be used for cheese that originates in a defined geographical area in Greece and that conforms to the applicable product specifications. However, some Danish producers have been continuing to market their cheese as "*Feta*" to third countries. The CJEU partly annulled an earlier registration of the name "*Feta*" as a PDO in a judgment of 16 March 1999 on Joined Cases C-289/96, C-293/96 and C-299/96, emphasising, in particular, that the Commission had paid insufficient attention to the actual situation in the EU Member States.

Prior to the adoption of Regulation (EC) No 1829/2002, in order to analyse whether the designation "*Feta*" is generic and cannot be registered as PDO, the Commission carried out an exhaustive consultation on the situation in all the EU Member States with regard to the production and consumption of "*Feta*" and the knowledge of the term professed by consumers. Regarding the situation in Denmark, Recital 14 of *Regulation (EC) No 1829/2002* notes that "*Denmark has been producing "Feta" cheese since the 1930s, almost exclusively for export*" and "*when the Community began granting export refunds on exports of "Feta" cheese in 1975, output increased tremendously, from 9868 tonnes in 1975 to a peak of 110932 tonnes in 1989. Since 1995, output has fallen steadily, and amounted to only 27640 tonnes in 1998, largely due to a fall in demand from third countries and the gradual reduction in export refunds for this type of cheese. Danish production is almost exclusively made from cow's milk*". The Commission concluded that the designation "*Feta*" is non-generic and the PDO for "*Feta*" was registered.

The infringement proceedings and the judgment of the Court

In the infringement proceedings, which commenced in 2018, the Commission claimed that Denmark had breached its obligations under Article 13 of *Regulation (EU) No 1151/2012* by failing to prevent or stop the use of the designation "*Feta*" on cheese produced in Denmark and intended for export to third countries. Denmark maintained that *Regulation No 1151/2012* applies only to products sold in the EU and does not cover exports to third countries where the EU has not yet concluded an international agreement guaranteeing the protection of that name.

Article 13 of *Regulation No 1151/2012*, in the version applicable at the relevant time, states that: "*1. Registered names shall be protected against: (a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration where those products are comparable to the products registered under that name or where using the name exploits the reputation of the protected name, including when those products are used as an ingredient; (b) any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation" or similar, including when those products are used as an ingredient; (c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product that is used on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin; (d) any other practice liable to mislead the consumer as to the true origin of the product*".

Denmark argued that its practice does not constitute a breach of the obligations under Article 13 of *Regulation No 1151/2012*, since its scope does not extend to products exported to third countries, given that the EU legislature did not intend to extend the prohibition on the use of PDO to products that do not comply with the applicable specification, but are exported to third countries with which the European Union has not concluded a multilateral or bilateral agreement on the protection of PDOs.

On 14 July 2022, the CJEU ruled against Denmark and held that, "*according to the wording of Regulation No 1151/2012, the use of a registered name to designate products not covered by the registration which are produced in the European Union and intended for export to third countries is not excluded from the prohibition laid down in that regulation*". The CJEU further noted that "*PDOs and protected geographical indications (PGIs) are protected as an intellectual property right by Regulation No 1151/2012*". Finally, the Court held that, although Article 13 of *Regulation No 1151/2012* does not explicitly refer to exports, the use of the PDO "*Feta*" to designate products produced in the territory of the EU, that do not comply with the product specification for that PDO, undermines the objectives "*to help producers of products linked to a geographical area by securing fair returns for the qualities of their products, by ensuring uniform protection of the names as an intellectual property right in the territory of the European Union, and by providing clear information on the value-adding attributes of the product to consumers*", even if those products are intended for export to third countries.

Denmark has not infringed its obligation under the principle of sincere cooperation

Denmark was not found, however, to have also infringed its obligation under the principle of sincere cooperation referred to in Article 4(3) of the Treaty on European Union. The Court held that, although exports to third countries by EU producers unlawfully using a PDO are likely to weaken the EU's position in international negotiations aimed at ensuring the protection of EU quality schemes, it has not been established that Denmark "*has taken any action or made any statements potentially having that effect*".

The protection of EU Geographical Indications in third countries

Related to the question of whether EU producers are bound by EU legislation on PDOs for their exports, is the protection of EU Geographical Indications in third countries. Agri-food and

drink products, whose names are protected by the EU as Geographical Indications (hereinafter, GIs), represent a sales value of EUR 74.76 billion, according to a study published in February 2021 by the Commission. Over one fifth of this amount results from exports outside of the EU. The study found that the sales value of a product with a protected name is on average double that for similar products without a certification.

On 20 April 2020, the Commission stated that it had "*concluded more than 30 international agreements, which allow the recognition of many EU Geographical Indications outside the EU and the recognition of non-EU Geographical Indications in the EU. Geographical Indications play an increasingly important role in trade negotiations between the EU and other countries*". Most recently, the *Agreement between the European Union and the Government of the People's Republic of China on cooperation on, and protection of, geographical indications* entered into force on 1 March 2021. The EU-China Agreement protects around 200 European and Chinese agri-food GIs. Also, the modernised EU-Mexico Trade Agreement will improve the protection in Mexico of intellectual property owned by EU companies. This includes making it illegal in Mexico to sell imitations of protected EU GIs listed in the annex of the IP Chapter, such as *Champagne*, *Parma* ham, and *Balsamic Vinegar from Modena*. These international agreements essentially prevent third country producers from using names protected as GIs in the EU. The judgment of the Court prevents EU producers' exports of products, which do not meet the PDO requirements, but that use the protected denomination in third countries not having reciprocal protection of EU's PDOs in place.

Legal and commercial relevance of the judgement and outlook

Reportedly, the European Commission considered that Denmark's actions "*could have set a precedent with the potential of undermining the EU's entire GI system which has an estimated sales value of almost €75 billion and represents 15.5% of the total EU agri-food exports*". While Greece is the world's largest producer of "*Feta*" cheese with annual production of 120,000 metric tonnes and domestic consumption amounting to more than 85% thereof, it makes up only 28% of global "*Feta*" exports, according to the World Intellectual Property Organization. Reportedly, Danish "*Feta*" exports average approximately 85,000 metric tonnes annually, primarily to India, Indonesia, and the United States. Following the judgment, exports with the denomination "*Feta*" are no longer permitted unless they comply with the PDO requirements.

If, in an action under Article 258 of the TFEU, the CJEU finds that there has been a failure to fulfil obligations under EU law, the EU Member State concerned, in this case Denmark, must comply with the Court's judgment "*without delay*". The judgement of the Court is relevant in the sense that it will prevent EU companies from exporting to third countries products using PDOs, but not complying with the respective specifications. This may concern, for example, cheese denominated as "*Feta*" that is not produced in the protected region, or, for example, "*Feta*" cheese that, even if produced in Greece, does not meet the product specifications, which require production either exclusively from sheep's milk, or from a combination of sheep's and goat's milk (with a maximum of 30% goat's milk). Denmark must act now and prevent that Danish cheese denominated as "*Feta*" be exported to third countries. In case the Commission considers that Denmark does not comply with the judgment, it may bring a further action seeking financial penalties under Article 260 of the TFEU.

Recently adopted EU legislation

Trade Law

- *Council Decision (CFSP) 2022/1313 of 25 July 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*

Trade Remedies

- *Commission Implementing Regulation (EU) 2022/1310 of 26 July 2022 initiating an investigation concerning possible circumvention of the anti-dumping measures imposed by Implementing Regulation (EU) 2020/1408 on imports of certain hot rolled stainless steel sheets and coils originating in Indonesia by imports of certain hot rolled stainless steel sheets and coils consigned from Turkey, whether declared as originating in Turkey or not, and making such imports subject to registration*

Food Law

- *Commission Implementing Regulation (EU) 2022/1322 of 25 July 2022 amending Implementing Regulation (EU) 2021/632 as regards the lists of products of animal origin, animal by-products and composite products subject to official controls at border control posts (1)*

- *Commission Implementing Regulation (EU) 2022/1323 of 27 July 2022 amending Regulation (EC) No 1484/95 as regards fixing representative prices in the poultrymeat and egg sectors and for egg albumin*

- *Commission Regulation (EU) 2022/1324 of 28 July 2022 amending Annexes II and III to Regulation (EC) No 396/2005 of the European Parliament and of the Council as regards maximum residue levels for benzovindiflupyr, boscalid, fenazaquin, fluazifop-P, flupyradifurone, fluxapyroxad, fosetyl-Al, isofetamid, metaflumizone, pyraclostrobin, spirotetramat, thiabendazole and tolclofos-methyl in or on certain products (1)*

- *Commission Implementing Regulation (EU) 2022/1317 of 27 July 2022 providing for derogations from Regulation (EU) 2021/2115 of the European Parliament and of the Council as regards the application of the standards for good agricultural and environmental conditions of land (GAEC standards) 7 and 8 for claim year 2023*

- *Commission Implementing Decision (EU) 2022/1316 of 25 July 2022 amending Decision 2008/911/EC establishing a list of herbal substances, preparations and combinations thereof for use in traditional herbal medicinal products (notified under document C(2022) 4341)*

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