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Clean labels and '*self-evident*' and '*flagrantly misleading*' '*palm oil-free*' claims

Under *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, the Food Information Regulation, FIR), which applies across the EU since 13 December 2014, the specific vegetal origin of vegetable oils used in food products (be it coconut, palm, rapeseed, sunflower, soy or any other vegetable oil) must be indicated in the list of ingredients of pre-packaged foods. Labelling the oil(s) merely as '*vegetable oil(s)*', as it had been done by the food industry for years, is no longer allowed.

'*Free-from*' campaigns have been waged, in particular, against palm oil, but also against other tropical oils for alleged nutritional and environmental reasons. As it was previously discussed here (see Trade Perspectives Issues No. 10 of 16 May 2014 and No. 23 of 12 December 2014), these campaigns appear to be, at best, deceptive or unsubstantiated generalisations and, at worst, fraudulent in nature and aimed at denigrating competing oils and/or promoting certain products by implying that whatever is used as an ingredient is better, healthier or environmentally greener than what is not used. In fact, for instance, when made in a nutritional context, these '*free-from palm oil*' labels on foodstuffs are arguably not approved and, therefore, illegal nutrition claims under *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods* and/or misleading and deceptive claims under the FIR and *Directive 2006/114/EC of the European Parliament and of the Council concerning misleading and comparative advertising*. Similarly, the environmental allegations appear to be unsubstantiated misleading generalisations in that not all vegetable oils contained in a specific product, and being discouraged or denigrated with the negative labels, are environmentally unsustainable.

In more recent times, the nature and tactics of the '*palm oil-free*' campaigns appear to be changing. This is undoubtedly the consequence of actions taken by the palm oil industry, at the administrative and judicial level, against some of the '*palm oil-free*' campaigners for their illegal, fraudulent, deceptive and/or anti-competitive behaviours. For the most part, manufacturers using '*palm oil-free*' claims no longer communicate, on the product or on their websites and other advertising platforms, the alleged nutritional or environmental reasons that made them decide to produce and market certain products as '*palm oil free*'. These new practices can be defined as '*plain*' negative labelling without any further explanation. Admittedly, manufacturers sometimes argue that there are no actual reasons for their choices other than the marketing appeal of these '*no-*' or '*-free*' labels on consumers.

However, there are legal consequences for such '*plain*' '*palm oil-free claims*' that have to be taken into consideration in light of the FIR. Under the FIR, by making it compulsory that the vegetable oil origin be specified (so that a consumer can make an informed choice in the selection of food products), a mere look at the list of ingredients now tells consumers whether a product contains a specific vegetable oil or not. '*Free-from certain oils*' campaigns directly on the products' packaging should, therefore, be seen not only as illegal or deceptive (as argued above), but now also unnecessary, since any consumer is able to tell what vegetable oil is present (or not) in any food product merely by looking at the list of ingredients.

Article 7(1)(c) of the FIR (on fair information practices) provides that food information must not be misleading, particularly: "*by suggesting that the food possesses special characteristics when in fact all similar foods possess such characteristics, in particular by specifically emphasising the presence or absence of certain ingredients and/or nutrients*". Article 36(2) of the FIR provides that food information provided on a voluntary basis shall: (a) not mislead the consumer, as referred to in Article 7; (b) not be ambiguous or confusing for the consumer; and (c) where appropriate, be based on the relevant scientific data. Therefore, voluntary food information, such as '*palm oil-free*' labels, must not suggest that the food possesses special characteristics when, in fact, all similar foods possess such characteristics, in particular by specifically emphasising the presence or absence of certain ingredients and/or nutrients. This provision addresses the legal concept of misleading advertisement with certainties (*i.e*., '*self-evident*' and '*flagrantly misleading*' advertising). Consumers must not be given the impression that something '*special*' is advertised when, in fact, all similar foods possess such characteristics, in particular by specifically emphasising the presence or absence of certain ingredients and/or nutrients.

There are several cases where EU Member States' authorities have stepped in to stop specific claims with decisions that were later confirmed upon review. In the Order of the Administrative Court in Uppsala of 30 June 2010, in cases No. 3453-10 and 3454-10, *Findus Sverige AB v. Livmedelsverket* (*i.e.*, the Swedish National Food Agency), the claim '*without preservatives*' was considered misleading because the products in question were frozen products. Since freezing is a form of preservation, practically no such products on the market contained preservatives. The claim was, therefore, '*self-evident*' and gave the consumer the impression that the products had properties that others did not.

Commission Directive 2006/141/EC on infant formulae and follow-on formulae prohibits the use of ingredients containing gluten in the manufacture of such foodstuffs. The German Working Group of Experts of Food Chemistry of the Federal States and the Federal Office for the Protection of Consumers and Food Security (Arbeitskreis Lensmittelchemischer Sachverständiger der Länder und des Bundesamtes für Verbraucherschutz und Lebensmittelsicherheit, or ALS, in its German acronym), in its Opinion No. 2011/57, held that a '*gluten-free*' claim on infant *formulae* and follow-on *formulae* is misleading as it constitutes a misleading '*self-evident*' advertisement with a certainty (*Irreführende Werbung mit einer Selbstverständlichkeit*) since, by law, no infant formulae and follow-on formulae can contain gluten (see for more details, Trade Perspectives Issue No. 9 of 2 May 2014).

In Belgium, the Commercial Court of Brussels ruled on 25 April 1986 that a fermented, partially skimmed milk containing various fruits, where the thermic treatment of the milk ensures its preservation (in a product similar to a yoghurt) and labelled as '*guaranteed without preservatives*', is misleading because it is obvious that thermic-treated and partially-skimmed milk does not contain any preservatives. In these products, no preservatives are needed. The absence of preservatives was, therefore not a special characteristic of that product and the negative claim was '*self-evident*' and '*flagrantly misleading*'.

In Italy, the Jury of the Advertising Self-Regulation Body (*Giurì dell'Istituto di Autodisciplina Pubblicitaria,* hereinafter *IAP*) issued two relevant decisions in 1989 and 2005, in which the exaltation of specific features of products, even though corresponding to the truth, were deemed unlawful, whenever such features may actually be found in all products of the same kind, insofar as required by the law or falling within the very composition of the product. In Decision No. 116/2005 of 25 July 2005, in the case *Granarolo Spa* v. *Danone Spa*, the IAP's Jury stated that "*any advertisement of a product presenting, as peculiar to the same, a characteristic that is vice-versa common to all the products of the same kind, amounts to misleading advertising and has thus the effect of establishing an indirect comparison, which very likely leads consumers to believe that the characteristic is special and, as such, possessed only be the product claiming it*". Likewise, in Decision No. 18/1989 of 14 July 1998 in case *Unilever Italia Divisione Van Den Bergh v. Fabat spa*, the IAP's Jury held that "*the self-appropriation on an exclusive basis of a quality, which instead is common to one's competitor's products as well*", amounts to an unlawful comparison.

Claims such as '*additives-free*' or '*free-from preservatives*' (commonly known as clean labels) can be made as long as they are true and the use of additives in such foods is legal. *Regulation (EC) No. 1333/2008 of the European Parliament and of the Council on food additives* indicates the specific additives that are permitted in the specific categories of food. For fresh fruit, *inter alia*, only a very limited number of additives are permissible. If the use of additives for a category of foodstuffs is not permitted anyway, a claim '*additives-free*' suggests that the foodstuff possesses special characteristics when, in fact, all similar foodstuffs possess such characteristics. Such advertisement, based on self-evident product information, is misleading.

Since 13 December 2014, all these cases are comparable to '*palm oil-free*' claims on, *e.g.*, a product containing sunflower oil or any other vegetable oil (and mandatorily indicating it in the list of ingredients), which is, therefore, promoted as something '*special*'. However, compared to similar foods that possess the same characteristics (*i.e.*, products containing sunflower oil, which is indicated by law in the labelling's ingredient list - but without a '*palm oil-free*' label), this product is in no way '*special*'. Therefore, now that under the FIR the specific origin of the vegetable oil must be declared, '*palm-oil-free*' claims are obvious, unnecessary and irrelevant (or '*self-evident*' and '*flagrantly misleading*', to use the categories and concepts defined in the cases above). '*Palm oil-free*' claims are also misleading because they give consumers the impression that products bearing such claims have properties that others have not.

In conclusion, when an ingredient or any other substance is banned in a product, or when similar products do not contain such substance, the indication that it is *'free-from*' such ingredient is misleading, because the consumer will think that he/she is purchasing something '*special*'. The same reasoning must apply to '*palm oil-free'* claims on products that already mandatorily display in the list of ingredients the specific vegetable oil(s) used. The consumer will think that he/she is purchasing something special, but he/she is being '*flagrantly misled*' by means of a self-evident advertisement.

While one could say that, before 13 December 2014, a '*palm oil-free*' claim on a given product could have provided special information in addition to the non-specified '*vegetable oil*' category in the list of ingredients (*i.e.*, information on which vegetable oil the product did not contain), since 13 December 2014, the consumer knows! When the list of ingredients does not contain palm oil, the '*plain'* '*palm oil-free*' claim, indicating that it is free from it, is obvious, self-evident and flagrantly misleading according to Article 7(1)(c) of the FIR. The product is not '*special*' *vis-à-vis* other products that contain vegetable oils other than palm oil and do not display such claim. When made in a nutritional or environmental context, these claims are also, respectively, not permitted nutrition claims or misleading claims. The possible argument that consumers may not look at the lists of ingredients, that are printed in small font, is also not valid, since, according to Article 13(2) of the FIR, mandatory particulars (such as the list of

ingredients) must be printed on the package or on the label in such a way as to ensure clear legibility, *i.e*., larger than it was usually done before.

In conclusion, since 13 December 2014, authorities in the EU Member States have a new legal basis to act and are called to urgently stop this type of misleading advertising, which has been allowed for far too long that has caused and is causing considerable damage to the palm oil industry, to food producers that use palm oil, and to EU consumers that deserve correct information.

The EU Commission triggers formal State aid investigation proceedings against Denmark for its saturated fat tax

On 4 February 2015, the EU Commission decided to initiate formal State aid investigation proceedings against Denmark in relation to a '*fat tax*' scheme that was in place in the country between October 2011 and January 2013. It appears that the scheme, which applied to a range of foodstuffs containing more than 2.3% of saturated fat, may have amounted to illegal State aid in breach of EU legislation.

In the modern economic jargon, '*fat taxes*' are a form of '*sin taxes*' (*i.e.*, excise or '*per unit*' taxes that are mainly designed to penalise consumers' behaviours perceived as harmful to society, and which are levied on certain goods and services that are generally condemned, such as alcohol and tobacco, and gambling) that apply to foods and drinks. '*Fat taxes*' are typically enacted in order to discourage consumption of products that are linked to obesity or to other health-related problems, with a view to reduce their prevalence. Simultaneously, '*fat taxes*' contribute to enrich State coffers.

Denmark's '*fat tax*' scheme (*i.e*., *Lov om afgift af mættet fedt i visse fødevarer* (Act on a tax on saturated fat in specific food)) required the payment of DKK 16 (*i.e*., around EUR 2.15) per kilogram of saturated fat on food products both produced in and imported into Denmark. The scheme applied to meat, dairy products, animal fat, edible oils and fats, margarine, spreadable blended spreads and other foods considered as substitutes or imitations of the above, having a saturated fat content superior to 2.3%. This *de minimis* threshold implied that most types of milk were exempt from the measure. *Inter alia*, products for export, additives, animal feed, certain food supplements and medicines were also exempt (see Trade Perspectives Issue No. 18 of 7 October 2011). The Danish '*fat tax*', aimed at promoting healthy dietary habits among the Danish population, was notified to the EU Commission in June 2011 and started to apply in October of the same year. However, the measure was abolished in January 2013 by the successive Danish Government, alleging excessive administrative burdens in its application.

The recently-issued decision by the EU Commission indicates that, following a preliminary examination, the EU Commission has doubts as to the compatibility of Denmark's '*fat tax*' with EU State aid rules and, accordingly, has decided to open a formal investigation procedure pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (TFEU). State aid can be defined as an advantage conferred on a selective basis in any form whatsoever to undertakings by national public authorities. Because of its possibly distortive effects on trade and competition within the EU, State aid is generally prohibited (although exemptions are foreseen in certain instances). The proceedings (which will be conducted in accordance with *Council Regulation (EC) No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union*) involve, *inter alia*, the gathering of information, on the basis of which, the EU Commission will reach a decision and close the formal procedure. Various outcomes are possible. Should the EU Commission conclude that (as it has been suggested) the exemption embedded in Denmark's '*fat tax*' (*i.e.*, covered products with less than 2.3% of saturated fats) constituted an aid incompatible with the EU's internal market, Denmark could reportedly be

required to collect (with interest) the extra tax revenue from the beneficiaries of the aid (*i.e.*, the operators that were originally exempted from the '*fat tax*').

Parallel disciplines to EU State aid rules are envisaged, under the WTO legal framework, in the Agreement on Subsidies and Countervailing Measures (hereinafter, SCM Agreement). The SCM Agreement defines a '*subsidy*' as a '*financial contribution by a government or a public body*' or '*any form of income or price support*', which confers a '*benefit*' to the recipient. The SCM Agreement does not outlaw subsidies in general, but disciplines them to ensure that they do not unduly affect international trade. Unless a subsidy is contingent upon export performance or upon the use of domestic over imported goods (in which cases, '*specificity*' is presumed and the subsidy is outright prohibited), a subsidy further needs to be proved to be '*specific*' (*i.e*., limited to an enterprise or industry or group of enterprises or industries), in order to be challengeable under the SCM Agreement.

In assessing whether the (abolished) Danish '*fat tax*' qualifies as a subsidy under the SCM Agreement, the question is whether Danish operators of covered commodities with a saturated fat content below the 2.3% threshold benefitted from '*government revenue […] otherwise due [being] foregone or not collected*' (a form of '*financial contribution*' envisaged in Article 1.1(a)(1)(ii) of the SCM Agreement). Of relevance to this assessment may be the *US – FSC* dispute, where the Appellate Body noted that the comparison between the revenue due under the contested measure and the revenue that would be due in some other situation is to be based on the WTO Member's tax rules in the given case (*i.e.*, the 2.3% *de minimis* threshold). As regards the notion of specificity, which needs to be assessed on a case-by-case basis, Article 2 of the SCM Agreement clarifies, *inter alia*, that a subsidy shall be deemed not to be specific when its eligibility is governed by '*objective criteria*' (*i.e.*, conditions that are neutral). The key issue appears to be whether not surpassing the 2.3% threshold constitutes a neutral condition or whether it favours certain enterprises or industries over others. Lastly, and even if the Danish '*fat tax*' were to be found to qualify as a specific subsidy, a complaining WTO Member would need to show that it causes '*adverse effects*' to the interests of WTO Members, in accordance with Article 5 of the SCM Agreement, a provision which requires a high standard of evidence.

Apart from the rules on subsidies, both the EU and WTO frameworks require that tax schemes not be discriminatory. Article 110 of the TFEU prohibits internal discriminatory taxation, directly or indirectly, on products of other EU Member States, in excess of that imposed directly or indirectly on similar domestic products. In parallel, Article III:2 of the General Agreement on Tariffs and Trade 1994 (hereinafter, GATT) prevents WTO Members from applying to imported products internal taxes in excess of those applied to domestic products. It also prohibits internal taxation applied so as to afford protection to domestic production. In addition, the Danish tax may have subjected imported products to additional certification requirements (to determine the tax base), which may be burdensome and cause administrative delays, in contravention of Article X:3 of the GATT.

The EU Commission should, in principle, reach a conclusion on whether Denmark's '*fat tax*' was compatible with EU State aid rules within 18 months. Although the opening of the formal investigation procedure has surprised many (the measure has not been in force for over two years), this measure was, from its early days, a target of criticism and potential legal conflict. In fact, the original draft envisaged that meat not be covered by the measure (despite being rich in saturated fat). However, following an exchange with EU authorities, where the latter advised that such an approach could have amounted to illegal EU State aid, Denmark included meat in the scope of the measure. Denmark has already announced that it will engage with the EU Commission's DG Agriculture and Rural Development (which is handling the procedure) in order to clear the facts. During this process, operators involved in the relevant sectors (both affected by the '*fat tax*' and exempted thanks to the 2.3% threshold) are

advised to engage with the relevant authorities in order to ensure that their interests are duly represented.

From a governmental standpoint, the EU Commission's decision to open State aid proceedings should alert other EU Member States that have adopted taxes of this type (*inter alia*, Hungary, see Trade Perspectives Issue No. 8 of 20 April 2012) or that stand to adopt them in the future (*e.g.*, France, which appears to consider to tax palm oil higher than other oils). Governments considering this kind of schemes should be warned against introducing measures that stand to, apart from triggering EU proceedings, affect international trade to such an extent that they are likely to be challenged before the WTO (inasmuch as '*fat taxes*' often single-out and penalise specific products and have the effect of protecting certain domestic industries from foreign competition). Obesity prevention and the promotion of healthy dietary habits are legitimate objectives that governments are entitled to pursue through a range of policy instruments. However, these policies must not become a leeway for countries to circumvent their international trade obligations.

The US files a request for WTO consultations with China regarding alleged export-contingent subsidies

On 11 February 2015, the US requested WTO consultations with China with respect to alleged export-contingent subsidies. The challenge relates to various incentives that the US alleges China is providing to companies that are located in certain industrial clusters and that meet export performance criteria. The dispute has the potential to further clarify the interpretation and application of numerous WTO agreements, including the GATT and the SCM Agreement.

This is not the first time that the US has challenged what it claimed to be export subsidies provided by the Chinese Government. On 19 December 2008, the United States requested consultations with China regarding the *China World Top Brand* and *Chinese Famous Export Brand* programmes. The US claimed that the programmes provided grants, loans, and other incentives to enterprises in China on the condition that those enterprises met certain export performance criteria. However, the dispute did not progress to the panel stage at the WTO because, as announced on 18 December 2009, China agreed to eliminate the challenged measures. On 17 September 2012, the US requested consultations with China in relation to grants, loans, government revenue foregone, the provision of goods and services and other alleged incentives to automobile and automobile-parts enterprises in China that it claimed were contingent upon export performance. In particular, the US described "*export bases*" for automobile and automobile-parts in the 12 Chinese municipalities. That dispute also never progressed to the panel stage, but the most recent dispute addresses the automobile and automobile parts industries, and it challenges the same programmes.

The new dispute is, effectively, an expansion of the dispute that the US initiated against China in 2012. According to the US, China is providing export subsidies through "*Common Service Platforms*" to manufacturers and producers in the following seven sectors: (1) textiles, apparel and footwear; (2) advanced materials and metals (including specialty steel, titanium and aluminium products); (3) light industry; (4) specialty chemicals; (5) medical products; (6) hardware and building materials; and (7) agriculture. The subsidies are, allegedly, being provided to companies that are located in industrial clusters throughout China, which are referred to as "*Demonstration Bases*". Through the "*Demonstration Bases-Common Service Platform*", as the US refers to it, China provides free and discounted services, as well as cash grants and other incentives, to companies that meet certain export performance criteria.

The previous disputes initiated by the US against China in the area of export subsidies suggest that the US will likely claim that China has violated Articles 3 and 25 of the SCM Agreement, Article XVI:1 of the GATT 1994 and Paragraphs 1.2, 2(C)(1) and 2(C)(2) of Part I

of China's Accession Protocol. Nonetheless, the request for WTO consultations published by the Office of the US Trade Representative (hereinafter, USTR) cites only Articles 3.1(a) and 3.2 of the SCM Agreement. Pursuant to Article 1.1 of the SCM Agreement, a subsidy is deemed to exist if there is a '*financial contribution by a government or any public body*' whereby '*a benefit is conferred*'. To be considered a prohibited subsidy or an actionable subsidy, a complainant must show that the subsidy in question satisfies Article 2 of the SCM Agreement, which deals with '*specificity*'. Typically, as explained in Article 2.1 of the SCM Agreement, this means that a subsidy is specific to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority. However, according to Article 2.3 of the SCM Agreement, specificity is automatically deemed to exist if the subsidy is, *inter alia*, contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance within the meaning of Article 3.1(a) of the SCM Agreement.

This is a key feature of the SCM Agreement for the US in this dispute, as it may have had difficulty proving '*specificity*' given the wide range of industries and enterprises that appear to be eligible for the alleged subsidy. As explained by the footnote to Article 3.1(a) of the SCM Agreement, for export-contingency to exist, the granting of the subsidy must be "*in fact tied to actual or anticipated exportation or export earnings*". It is insufficient to simply show that a subsidy is granted to enterprises that export. Further clarification is provided by an Illustrative List of Export Subsidies in Annex I of the SCM Agreement. The request for WTO consultations provided by the USTR does not elaborate on how the subsidies are export-contingent, or even whether they are claiming *de jure* or *de facto* export-contingency. However, according to reports, qualification for some of the subsidies include Chinese officials first evaluating the companies based on their potential as exporters and whether they have the proper certification in their target markets. Some fact-finding may also still be taking place. According to the US, it has had difficulty assessing the exact extent of the relevant programmes because of a lack of transparency on China's part. A similar issue was present when the US challenged the "*export bases*" for the automobile and automobile-parts industries in China, which led to claims under Paragraphs 1.2, 2(C)(1) and 2(C)(2) of Part I of China's Accession Protocol on transparency.

According to the USTR, over USD 1 billion in subsidies at 179 "*Demonstration Bases*" are at issue. As a result, the dispute has the potential to extend for months or years given the settlement negotiations, fact-finding, submissions and appeals that may occur. At the very least, the dispute cannot progress to the next stage in litigation until 60 days after the US filed its request for WTO consultations. Interested parties should monitor the developments, especially because the outcome of the dispute may shape how countries are able to support their domestic industries in the future. Governments should also take note of the claims made by the US in regards to transparency. Although the claims are likely with respect to China's Accession Protocol, WTO Members have transparency obligations under Article X of the GATT on the "*Publication and Administration of Trade Regulations*". These obligations are also regularly incorporated by reference in other trade agreements. Transparency is a key characteristic of properly-functioning trade relationships and countries should make efforts to ensure that they comply with these obligations.

Recently Adopted EU Legislation

Food and Agricultural Law

- *Commission Regulation (EU) 2015/186 of 6 February 2015 amending Annex I to Directive 2002/32/EC of the European Parliament and of the Council as regards maximum levels for arsenic, fluorine, lead, mercury, endosulfan and Ambrosia seeds*

Other

- *Council Implementing Decision (EU) 2015/200 of 26 January 2015 amending Implementing Decision 2014/170/EU establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing as regards Sri Lanka*

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