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100 EU Geographical Indications will soon be protected in China, while Italian authorities investigate fraudulent production of protected *Parma* and *San Daniele* ham

Reports in June 2017 indicate that Italian authorities continue to investigate a case of serious fraudulent activities with respect to *Prosciutto di Parma* and *Prosciutto di San Daniele*, two ham varieties protected by the EU's scheme of Geographical Indications (hereinafter, GIs). The apparently increasing number of food fraud cases threatens to undermine the renowned quality scheme of GIs, although the argument can also be made that the enforcement and protection of GIs is a sign that the system is working. At the same time, the EU continues to pursue the protection of its GIs at the international level. Both Italian ham varieties are also included in a list, which the European Commission (hereinafter, Commission) formally published on 2 June 2017, providing the GIs that are set to be included in a bilateral agreement with China that is to be concluded by the end of this year.

The delicate issue of protecting certain products through GIs plays a major role in EU agricultural policies, as well as in ongoing international trade negotiations. The approach aims at supporting regional specialities, while at the same time enhancing and safeguarding their reputation. In the EU, *Regulation (EU) No. 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs* maintains the protection of GIs. This Regulation designates two types of GIs: 1) a Protected Designation of Origin (PDO), which applies to foodstuffs that are produced, processed and prepared in a given geographical area using recognised '*know-how*'; and 2) a Protected Geographical Indication (PGI), which indicates a link with the area in at least one of the stages of production, processing or preparation. Additionally, names that have become generic (*e.g.*, Dijon mustard) and names that conflict with the name of a plant variety or an animal breed may not be registered as GIs in the EU.

The legal concept of GIs aims at providing legal protection against the imitations and usurpations of food and agricultural products. The protection through GIs focuses on preventing the misuse of names, which could mislead consumers as to the origin of agricultural products and their quality or characteristics, which provide added culinary and economic value. The EU notes that GIs are one of the great successes of EU agriculture, with over 3,300 EU names currently registered. A further 1,250 non-EU names are also protected within the EU, mostly under bilateral agreements, such as the agreement with China that is currently under negotiation. GIs have considerable economic importance for EU famers and the EU food industry. Most notably, products protected by a GI can be sold at higher prices, often at around twice the price of their immediate non-GI competitors. *Parma*

ham alone is an industry generating EURO 750 million per year. Overall, the market for EU's GIs is estimated at around EURO 54.3 billion and, together, EU's GIs account for 15% of total EU food and drinks exports.

In February 2017, the EU's Joint Research Center (JRC) noted in its '*Monthly Summary of Articles on Food Fraud and Adulteration*' that Italian authorities were investigating the whole cured ham sector, in particular the PDO protected products *San Daniele* and *Parma* hams, in nine provinces. According to the report, 30 individuals are suspected of having engaged in fraudulent activities using improper animals to produce cured GI ham and forging documents to reconstruct the traceability of the meat. The so-called '*Single Documents*' for *Parma* ham and for *San Daniele* ham, providing the detailed guidelines for products qualified under the respective GI, contain rules on the geographic origin of *Parma* and *San Daniele* ham. The relevant EU rules provide for a concise definition of the geographical areas, distinguishing between production and breeding and slaughtering. Production of *Parma* ham may only take place in the defined area in the Province of Parma, which includes the territory of the Province of Parma (in the Region of Emilia-Romagna, Italy) that lies no less than 5 kilometres south of the Via Emilia at an altitude of no more than 900 metres, and bordered to the east by the Enza river and to the west by the Stirone river, while the production of *San Daniele* ham may only take place within the municipality of San Daniele del Friuli, in the province of Udine.

For both hams, the raw materials (*i.e.*, the pig legs) must originate from one of ten specified Italian regions. The raw material for *Parma* ham may originate in the administrative regions of Emilia-Romagna, Veneto, Lombardy, Piedmont, Molise, Umbria, Tuscany, Marche, Abruzzi, Lazio, while for *San Daniele* ham, the breeding and slaughtering of pigs may take place in the territory of the regions of Friuli-Venezia Giulia, Veneto, Lombardy, Piedmont, Emilia Romagna, Umbria, Tuscany, Marche, Abruzzo and Lazio. Since earlier this year, Italian investigators allege that Italian pig breeders and owners of slaughterhouses imported high-quality genetically-enhanced pig sperm from outside of Italy in order to breed pigs and obtain higher numbers and leaner piglets with bigger litters. This would lead to an increased amount of ham and increased profits. Reportedly, Italian food police searched 30 farms and slaughterhouses to collect DNA samples from the pigs intended for ham production.

Within the EU, it is the EU Member States that are responsible for the implementation and enforcement of the high number of EU's GIs. This enforcement appears to function to different degrees of satisfaction in the different EU Member States, which may be due to the respective EU Member State's usage and familiarity with GIs (see *Trade Perspectives*, Issue No. 4 of 26 February 2016). All controls, enforcement procedures and legal actions with respect to GIs are carried out by national authorities in the respective EU Member States. In particular, the competent authorities of EU Member States carry out controls to verify the compliance of product specification and to monitor the market in order to detect possible cases of usurpation. When the relevant competent authority identifies non-compliance, as it now did in Italy, it should take action to ensure that the operator remedies the situation by taking the appropriate administrative or judicial measures. Interested parties, public authorities and food business operators alike, should closely monitor the proceedings in Italy and be vigilant in order to safeguard the GI scheme and to avoid endangering consumers' trust in the protected products. In order for consumers not to lose trust in the GI food quality scheme, they must be able to trust the food producers and the relevant authorities controlling them. Food producers must apply the relevant rules contained in the GI schemes pertaining to their products. If they deviate from those rules, producers risk losing the qualification of their products under the GI quality scheme.

This has relevance for the consumer on the EU market, but also, increasingly, for consumers abroad and the EU's trading partners, as the EU continues to incorporate GI protection in its broader trade agreements and in dedicated agreements on GIs. On 2 June 2017, the EU and China formally published a list 100 EU GIs and 100 Chinese GIs, considered for protection through a bilateral GIs agreement to be concluded by the end of this year. The publication of

the respective lists is a step forward of a project that began in 2007, when the EU and China formally agreed to protect agricultural GIs, beginning with 10 GIs from each territory. '*Prosciutto de Parma*' was already among the first 10 EU products listed in the project with China and *San Daniele* ham is now to be added. Back in 2012, the EU and China envisaged to broaden the scope and conclude a bilateral agreement on GIs. However, while similar systems protecting GIs exist in the EU and in China, differences remain with respect to the administrative procedures and the linguistic barriers. Considering that the Chinese market for agro-food products is one of the world's largest and continues to grow, the EU has a strong interest in bringing its high quality products onto the Chinese market and achieving a high degree of protection from imitations.

Most importantly for the EU agro-food industry, the Commission underlined that interested parties now have two months to comment on the products selected by the EU and China and may raise any concerns with either the EU or Chinese authorities. Interested parties in the EU and China should, therefore, carefully analyse the scope of the respective lists and their potential consequences for the respective markets. The issue of GIs plays an important role for agricultural producers within the EU, as well as for domestic consumers and with respect to international trade. The enforcement of GIs and the production in respect and application of the guidelines set out in the relevant legislation is key to maintain high quality products and the consumers' trust. Interested parties should be part of the debate and reach out to the relevant officials, so as to ensure that their business interests are properly considered, be it for the enforcement of the GI rules in EU Member States and in other countries or within the context of the negotiations of dedicated GI agreements.

The need for crop-based biofuels in the EU's renewable energy framework

Speaking at an event on 7 June 2017, a senior natural resources officer with the United Nations Food and Agriculture Organisation (hereinafter, FAO), Mr. Olivier Dubois, addressed the debate surrounding the use of crop-based biofuels. The discussion highlights continued efforts to reform energy frameworks, in particular in the EU, and the need for practical solutions towards improving sustainability in the sector that do not *de facto* discriminate against certain biofuels. The EU is currently in the process of reviewing and, subsequently, revising its renewable energy policies.

The event, sponsored by EURACTIV, a pan-European media network specialised in EU policies, and titled "*Biofuels and Sustainability: Decarbonising transport and fuelling food security*", sought to stimulate discussion on the role of biofuels and food security in reaching the EU's climate and energy goals for transport. Reports indicate that Mr. Dubois took the opportunity to counter the "*oversimplified and sweeping statements*" that do not reflect reality, including the idea that crop-based biofuels are necessarily bad for food. Instead, Mr. Dubois stated that crop-based biofuels should be viewed as a tool for responsible investment in agriculture and rural development. Mr. Dubois used as examples the sugar and palm oil industries to illustrate his point. He recognised that the first sector, sugar, was not known to cause fundamental problems in terms of food security or create large land use changes, and that, Brazil had significantly invested in the sugar industry to the point that it was now able to produce enough for food consumption as well as energy consumption (*i.e.*, ethanol fuel). With respect to the palm oil sector, Mr. Dubois recognised that palm oil accounts for two-thirds of global vegetable oil production, and is produced with a yield three to four times higher than other vegetable oils. This is important because palm oil allows for greater production by small-scale farmers, which account for 45% of its production. The comments by Mr. Dubois come amidst increasing calls for the use of second-generation (or "*advanced*") biofuels, which are derived from biomass (*i.e.*, non-food parts of crops, as well as crops not used for food purposes). Mr. Dubois opined that the Commission's proposal pertaining to second generation biofuels was "*a bit restrictive*", and that optimistic projections showed that second generation biofuel production could meet 10% of renewable energy needs by 2030.

Accordingly, he stated that in order to reach the EU's climate change objectives, first generation biofuels (*e.g.*, vegetable oils) should be part of the framework.

Said framework is currently found in *Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC* (*i.e.*, Renewable Energy Directive, or RED). The RED requires that the EU fulfil 20% of its energy needs via renewable sources by 2020 and, with respect to transport fuels specifically, it requires that at least 10% be derived from renewable sources by 2020. On 30 November 2016 (and later corrected on 23 February 2017), the Commission published its proposal for a revised RED, which calls for 27% of energy needs be met with renewable sources by 2030. With respect to biofuels, the revised RED proposal includes the objective of "*developing the decarbonisation potential of advanced biofuels and clarify the role of food-based biofuels post 2020*". Currently, the RED states that the contribution from biofuels and bioliquids, as well as from biomass fuels consumed in transport, if produced from food or feed crops, shall be no more than 7% of final consumption of energy in road and rail transport. The Commission's revised RED proposal calls for this limit to be reduced to 3.8% by 2030. For a biofuel to be used in the calculation of final energy consumption, it must qualify as '*sustainable*' under the EU's criteria. Until 2017, this meant, in part, that biofuels must have achieved greenhouse gas (hereinafter, GHG) emissions savings of at least 35%, but as of 2017 this requirement was raised to 50%.

In recent years, some WTO Members have questioned the WTO-consistency of the EU's sustainability criteria, especially as incentivised by the RED. In the context of WTO rules, Article III:4 of the General Agreement on Tariffs and Trade and Article 2.1 of the TBT Agreement require non-discriminatory treatment between '*like*' products. Traditionally, the approach used to determine '*likeness*' includes the consideration of: (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' perceptions and behaviour in respect of the products; and (iv) the tariff classification of the products. Insomuch as Article 2.1 of the TBT Agreement is concerned, in *US – Clove Cigarettes*, the WTO Appellate Body found that the determination of '*likeness*' using the traditional factors listed above is also a determination of the competitive relationship between the products. When applied to biofuels, it is questionable whether the emissions produced during the lifecycle and beyond are an issue that should be considered at all when assessing '*likeness*', to the extent that they do not appear to have an impact on any of the factors listed above. Article 2.2 of the TBT Agreement goes on to prohibit measures that appear to be more trade-restrictive than necessary to fulfil a legitimate objective. Such legitimate objectives include "*plant life or health, or the environment*". However, Article 2.2 of the TBT Agreement states that, in assessing such risks, relevant elements of consideration include available scientific technical information, related processing technology, or intended end-uses of products. This is especially relevant given reports indicating that, last year, the former Director of Renewables, Research, and Energy Efficiency of the Commission, Ms. Marie Donnelly, made statements that arguably show the underlying *de facto* discriminatory nature of the EU's renewable energy framework. In particular, Ms. Donnelly noted that, "*[w]e have to be very sensitive to the reality of citizens*' *concerns, sometimes even if these concerns are emotive rather than factually based or scientific*".

Regardless of the WTO-consistency or inconsistency of the EU's RED and the Commission's revised RED proposal, the recent discussions at the EURACTIV event on 7 June 2017 support the need for the EU to ensure that its renewable energy framework is not *de facto* discriminatory, at the very least because, in order to meet its climate change objectives, the EU will likely need to support the use of both, first and second generation biofuels. Interested stakeholders should continue to monitor the EU's efforts to reform its renewable energy framework, and take steps to ensure that it remains practical and consistent with the EU's international trade obligations.

Court of Justice of the European Union: Commission did not err in not authorising health claims that encourage the consumption of sugar

On 8 June 2017, the Court of Justice of the European Union (hereinafter, CJEU) dismissed *Dextro Energy*'s appeal against the judgment of the General Court of 16 March 2016, which found that the European Commission (hereinafter, Commission) had not erred in concluding that certain health claims, for which *Dextro Energy* sought authorisation, encouraged the consumption of sugar, given that such encouragement is incompatible with generally accepted nutrition and health principles. Recital 18 of *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods to use* (hereinafter, NHCR) provides that a nutrition or health claim should not be made if it is inconsistent with such generally accepted nutrition and health principles (which are not further defined) or if it encourages or condones excessive consumption of any food or disparages good dietary practice.

The German company *Dextro Energy* manufactures various products, in different formats, made almost entirely of glucose for the German and European markets. The '*classic cube*' is made up of eight tablets, each containing six grams of glucose. In 2011, *Dextro Energy* requested authorisation under the NHCR for the following health claims: '*glucose is metabolised within the body's normal energy metabolism*'; '*glucose supports normal physical activity*'; '*glucose contributes to normal energy-yielding metabolism*'; '*glucose contributes to normal energy-yielding metabolism during exercise*'; and 'g*lucose contributes to normal muscle function*'. For the first and third claims, the target population was the general public, whereas the other three claims targeted active men and women in good health, who are accustomed to endurance training.

Despite a positive opinion by the European Food Safety Authority (hereinafter, EFSA), which considered that a cause-and-effect link could be established between the consumption of glucose and normal energy-yielding metabolism, the Commission refused to authorise said health claims in *Regulation (EU) 2015/8 of 6 January 2015 refusing to authorise certain health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health.* Prior to adopting Regulation (EU) 2015/8, the Commission obtained consensus for a refusal among the representatives of the EU Member States in the Standing Committee on Plants, Animals, Food and Feed. In Regulation (EU) 2015/8, the Commission argued that the health claims in question conveyed a contradictory and ambiguous message to consumers, as they encouraged the consumption of sugar, whereas national and international authorities recommended a reduction in sugar intake, on the basis of generally accepted scientific advice. The Commission considered that the message remained confusing for the consumer, even if those health claims were to be authorised only subject to specific conditions of use and/or were accompanied by additional statements or warnings.

The General Court dismissed *Dextro Energy*'s application on 16 March 2016, thus confirming the Commission's decision. The General Court observed, in particular, that, although the Commission had not questioned the advice given by EFSA (the sole task of EFSA being to verify whether the health claims are based on scientific evidence and whether the wording of the claims meets certain criteria), it was required, as a risk-management measure, to take account of the applicable EU legislation and other legitimate relevant factors. Since, according to generally accepted nutrition and health principles, the average consumer must reduce his or her sugar consumption, the General Court held that the Commission did not err in finding that the health claims in question, which highlight only the beneficial effects of glucose for energy metabolism without mentioning the dangers inherent in increased sugar consumption, were ambiguous and misleading and could not therefore be authorised.

In the judgment (not yet available in English) in case C 296/16 P, the CJEU dismissed *Dextro Energy*'s appeal against the judgment of the General Court as none of the arguments put forward by that company succeeded. The appeal, which was admissible on issues of law

only (as opposed to issues of fact), was unfounded. The CJEU referred to the judgment in Neptune Distribution, C 157/14 (see *Trade Perspectives*, Issue No. 5 of 11 March 2016) and held in paragraphs 52 to 54 that, with regard to judicial review of the conditions of the implementation of the principle of proportionality, the EU legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The provisions of the NHCR, in particular those that lay down limitations on the use of the claims and indications at issue in the main proceedings, aim at ensuring a high level of consumer protection, to guarantee adequate and transparent information for the consumer, to ensure fair trading, and to protect human health. However, information that is incomplete, ambiguous or misleading, which may mislead the consumer, cannot be protected by the freedom of expression, the freedom of information and the entrepreneurial freedom.

The judgment confirms that the Commission may reject, on the basis of generally accepted nutrition and health principles, certain health claims, even where there is a favourable opinion of the EFSA. '*Generally accepted nutrition and health principles*' is a somehow vague concept that does not give food business operators a sufficient degree of legal certainty before entering into the lengthy EU claims authorisation procedure. The drafters of the NHCR, however, wanted to address this matter through the adoption of nutrient profiles. In simple terms, nutrient profiles are generally intended to determine whether foods are, based on their nutrient composition, eligible to bear claims (see *Trade Perspectives*, Issue No. 13 of 26 June 2015). Nutrient profiles must ensure that foods high in, *e.g.*, sugar, fat or salt, do not carry a nutrition or health claim (*e.g.*, a sugary lollipop that claims to be '*low in fat*', or breakfast cereals with very high sugar content claiming to be '*high in vitamin D*'). The application of nutrient profiles as an additional criterion in the NHCR aims at avoiding a situation where nutrition or health claims mask the overall nutritional status of a food product, which could mislead consumers when trying to make healthy choices in the context of a balanced diet. Article 4 of the NHCR foresees the setting of such nutrient profiles by the Commission. The development of nutrient profiles, originally scheduled for January 2009, has not been finalised.

The adoption of nutrient profiles for nutrition and health claims under the NHCR would, therefore, give operators more legal certainty and commercial predictability. Arguably, the application of nutrient profiles for a product consisting almost entirely of glucose would indicate that nutrition and health claims for such product are not permitted. *Dextro Energy* could have avoided a lengthy authorisation process and two instances of litigation knowing exactly (and beforehand) the nutrient profile of its product and that the approval of certain claims would be difficult. '*Learning*' in litigation of vague '*generally accepted nutrition and health principles*' is unsatisfactory and unfeasible for any small or medium sized food business operator.

As it has been reported in an earlier issue of *Trade Perspectives* (see *Trade Perspectives*, Issue No. 8 of 22 April 2016), the jurisprudence of the highest EU courts may be interpreted as meaning that the establishment of nutrient profiles is not needed and that the Commission can, nevertheless, apply generally accepted nutrition and health principles for the consideration of the question of the approval of a claim on a case-by-case basis. This, however, leaves food business operators uncertain, as EU courts have ruled that the Commission has wide discretion. In such a scenario, the industry may indeed welcome the establishment of nutrient profiles as legal certainty could be achieved. For which nutrients to set them, and at which level, is again a complex undertaking and the failed attempts at the EU level since 2009 confirm this. While the EU legislator has so far not done it, nutrient profiles are being established in EU Member States, in other European countries and throughout the world, particularly in Latin America. On 15 May 2017, five major food companies and three civil society organisations sent a joint letter to the Commission expressing their support for the urgent adoption of EU-wide nutrient profiles for nutrition and health claims (see *Trade Perspectives*, Issue No. 11 of 2 June 2017). The joint letter states

that the lack of nutrient profiles to underpin the ability to make claims may result in consumers being misled about the healthfulness and nutritional attributes of products; and that the absence of EU-wide nutrient profiles undermines the level playing field that the industry needs in order to compete fairly and to innovate. The signatories are concerned that the fitness check of the NHCR, which is currently under way, will further delay the establishment of nutrient profiles. They remain willing to contribute, to provide their expertise and to be part of the discussion.

It appears that it is still going to take time until nutrition profiles are set, despite the food industry's call on the Commission to urgently set them for nutrition and health claims before the Regulatory Fitness and Performance programme (hereinafter, REFIT) has concluded. Under the REFIT evaluation, the concept of nutrient profiles is currently re-evaluated and may even be abandoned (see *Trade Perspectives*, Issue No. 8 of 22 April 2016, Issue No. 12 of 17 June 2016 and Issue No. 13 of 26 June 2015). Developments in the EU on the setting of nutrient profiles should be closely monitored and operators should be prepared to participate in shaping potentially upcoming EU legislation by interacting with EU Institutions, EU Member State Governments, relevant trade associations and affected stakeholders.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2017/969 of 8 June 2017 imposing definitive countervailing duties on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2017/649 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China*

Customs Law

- *Commission Implementing Regulation (EU) 2017/989 of 8 June 2017 correcting and amending Implementing Regulation (EU) 2015/2447 laying down detailed rules for implementing certain provisions of Regulation (EU) No. 952/2013 of the European Parliament and of the Council laying down the Union Customs Code*

Trade-Related Intellectual Property Rights

- *Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark*

Other

- *Commission Regulation (EU) 2017/999 of 13 June 2017 amending Annex XIV to Regulation (EC) No. 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)*

- *Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EU) No. 531/2012 as regards rules for wholesale roaming markets*

Ignacio Carreño, Tobias Dolle, Lourdes Medina Perez, Bruno G. Simões and Paolo R. Vergano contributed to this issue.