FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 11 of 4 June 2021

Business Roundtable on '*Perspectives for an EU-Thailand Free Trade Agreement (FTA)*'

Negotiations for a preferential trade agreement between the EU and Thailand had started in 2010, but were suspended in 2014 due to the political situation in Thailand. In March 2019, Thailand held general elections, which the EU considered to be an important development on the path to improved relations. At the time, the EU's Foreign Affairs Council stressed "*the importance of taking steps towards the resumption of negotiations on an ambitious and comprehensive Free Trade Agreement*".

At the end of 2020, the resumption of negotiations for an EU-Thailand Free Trade Agreement (FTA) gathered new *momentum* and both parties were discussing internally whether the resumption of trade negotiations could be possible in 2021.

In view of the opportunities that an EU-Thailand FTA could deliver, *FratiniVergano*, the *EU-ASEAN Business Council* (EU-ABC), the *European Services Forum* (ESF), and the *Thai-European Business Association* (TEBA) are organising a *Business Roundtable on 'Perspectives for an EU-Thailand Free Trade Agreement (FTA)'*, which will take place virtually on **Thursday, 17 June 2021, at 10.00-11.30 CET / 15.00-16.30 Bangkok time / 16.00-17.30 Singapore time**. We cordially invite you to join us for this event.

Join us to find out more and contribute to the discussion. To register, please click here.

The EU's focus on enforcement of trade commitments: The European Commission concludes its examinations regarding '*Tequila*' and ceramic tiles

On 4 May 2021, the EU published the reports on two examinations conducted by the European Commission (hereinafter, Commission) on the basis of *Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification)* (hereinafter, Trade Barriers Regulation) which concerned, respectively, Saudi Arabia's measures on ceramic tiles originating in the EU and Mexico's refusal to issue export certificates for the liquor '*Tequila*'. These are the first two examinations concluded by the Commission since the Commission's first Chief Trade Enforcement Officer took office in 2020. These two examinations must be seen in the context of the EU's increased efforts on enforcement of the trade commitments undertaken by its trading partners.

The EU's increased emphasis on the enforcement of trade commitments

Over the past ten years, the EU has concluded a number of preferential trade agreements and, following their conclusion, the Commission has placed increased focus on their implementation and enforcement. In 2020, the Commission appointed *Denis Redonnet* as the EU's first *Chief Trade Enforcement Officer*. The *Chief Trade Enforcement Officer* is responsible for managing investigations under the EU's Trade Barriers Regulation and for initiating investigations where the Commission requires more information on potential barriers to trade (see *Trade Perspectives*, Issue No. 17 of 20 September 2019 and Issue No. 1 of 17 January 2020). On 28 October 2020, the Commission, the European Parliament and the Council of the EU reached a political agreement on the revision of the EU's so-called Enforcement Regulation (see *Trade Perspectives*, Issue No. 1 of 17 January 2020). European Commission Executive Vice President and European Commissioner for Trade *Valdis Dombrovskis* stated that "*the agreement expands the EU's ability to defend its interests when a trade dispute is blocked under the WTO*". This will also apply to bilateral trade agreements. Additionally, on 16 November 2020, the Commission introduced a new complaint mechanism related to the enforcement of trading partners' trade commitments (see *Trade Perspectives*, Issue No. 22 of 27 November 2020). The newly launched Single Entry Point complaint mechanism, and the reformed Enforcement Regulation, together with the Trade Barriers Regulation, constitute the EU's trade enforcement toolbox.

Investigation on Saudi Arabia's certification requirement on ceramic tiles

The first of the two recent examinations under the EU's Trade Barriers Regulation concerns Saudi Arabia's certification requirement on ceramic tiles originating in the EU. The EU is a world leader in the production of high quality ceramic products, such as tiles and bricks. The two main EU Member States exporting ceramic tiles are Italy and Spain. Around of 30% of the total EU tableware and tiles production is exported to markets outside of the EU. On 23 April

2020, the *European Ceramic Industry Association* (*Cerame-Uni*) submitted a complaint to the Commission under Article 4 of the EU's Trade Barriers Regulation. *Cerame-Uni* stated that new technical rules imposed by Saudi Arabia in 2019, namely the technical regulation for building materials, which includes ceramic tiles, as well as the *Saudi Quality Mark* (hereinafter, SQM) and the new conformity assessment system to establish conformity with Saudi Arabia's technical regulations applicable to ceramic tiles, have created "*serious obstacles for the Union producers of ceramics to export*". *Cerame-Uni* stated that, between September 2019 and February 2020, the measures imposed by Saudi Arabia had caused a decrease of 75% to 80% of EU ceramic tiles exports to Saudi Arabia. The complaint claimed that Saudi Arabia's measures on certification requirements were inconsistent with the Agreement on Technical Barriers to Trade (hereinafter, TBT) of the World Trade Organization (hereinafter, WTO), with Article VIII on '*Fees and Formalities connected with Importation and Exportation*', and with XI '*General Elimination of Quantitative Restrictions*' of the General Agreement on Tariffs and Trade 1994 (hereinafter, GATT).

On 4 May 2021, the Commission published its *Report to the Trade Barriers Regulation Committee – Union examination procedure following a complaint on obstacles to trade within the meaning of Regulation (EU) 2015/1843 applied by the Kingdom of Saudi Arabia consisting of measures affecting the import of ceramic tiles*. The report concludes that certain claims of *Cerame-Uni*'s complaint on the basis of the EU's Trade Barriers Regulation raised serious concerns "*in terms of WTO compliance*", further noting that another set of claims required additional evidence "*to confirm possible compliance issues as regards Saudi Arabia's obligation under GATT and the TBT Agreement*", referring, *inter alia*, to a possible discrimination of EU producers in favour of domestic or third country producers. The Commission's report notes that the measures imposed by Saudi Arabia had "*a clear negative economic impact on EU exports of ceramic tiles*" and, even though exports recovered at the end of 2020, the measures are still in place and continue impacting EU exports. The report notes that it is expected for exports to decrease again due to the necessary renewal of the SQM certificates in 2022, possibly causing a negative effect similar to the one observed in 2019. Therefore, the report states that it is in the EU's interest to act and it recommends that the EU pursue a negotiated solution with Saudi Arabia "*in order to remove all of the obstacles as quickly and as efficiently as possible*". Finally, the report states that, at this stage, "*an action before the WTO is not recommended*". However, depending on the outcome of the negotiations, the EU might still consider bringing the issue before the WTO.

EU investigation on Mexico's refusal to issue export certificates for 'Tequila'

The second examination conducted under the EU's Trade Barriers Regulation concerns Mexico's refusal to issue export certificates for the liquor '*Tequila*'. On 8 June 2020, the *Brewers of Europe*, an association representing the European beer manufacturing sector, filed a complaint to the Commission regarding the refusal by Mexico's *Consejo Regulador del Tequila* (hereinafter, CTR), an association representing the interests of Mexico's '*Tequila*' producers, to issue export certificates for shipments of '*Tequila*' spirit producer *Tequila del Señor (hereinafter, TdS)* to the French company *France Boisson Trading* affiliated with the Dutch multinational brewing company *Heineken NV*. The '*Tequila*' was destined to produce the Tequila-based/flavoured '*Desperados*' beer. '*Tequila*' is a distilled beverage made from the blue agave plant and a protected Mexican geographical indication (GI) recognised in the EU since 2019. *Brewers of Europe* claimed that Mexico's measure was inconsistent with Article XI of the GATT, prohibiting quantitative restrictions, and that the measure was in breach of the 1997 EU-Mexico Agreement on the mutual recognition and protection of designations for spirit drinks.

According to the CTR, the reason for the refusal of the export certificate was due to "*the alleged breach by TdS and its contractual partner Heineken of the Mexican Official Standard NOM-006-SCFI-2012 (NOM-006) concerning the production and commercialisation of 'Tequila' spirit*". The CTR has been allocated regulatory competences under Mexican law in order to protect '*Tequila*''s reputation and for purposes of issuing export certificates. According to statements made by the CTR, the issue at stake is an alleged adulteration of '*Tequila'* spirit by

Heineken NV in the EU and the failure of *Tequila del Señor* to "*conclude a co-responsibility agreement with Heineken*" to ensure compliance with the relevant Mexican standards. According to the Mexican standard NMX-049-V-NORMEX for the production of alcoholic beverages containing '*Tequila'*, these beverages must contain at least 25% of '*Tequila'* content in order to use the label '*Tequila*'. In the case of '*Desperados*' beer, '*Tequila'* is used as a mere flavouring rather than a major ingredient. '*Desperados*' is a lager beer containing 5.9% alcohol with 75% '*Tequila*' flavouring, but no '*Tequila*' content.

On 4 May 2021, the Commission published its *Report to the Trade Barriers Regulation Committee – Union examination procedure following a complaint on obstacles to trade within the meaning of Regulation (EU) 2015/1843 applied by the United Mexican States consisting of measures affecting the import of 'Tequila'*. The report provides an analysis of the possible inconsistency of Mexico's measure with Article XI of the GATT, which states that "*no prohibitions or restrictions other than duties, taxes or other charges, (…) shall be instituted or maintained by any contracting party on the exportation or sale for export of any product destined for the territory of any other contracting party*". The Commission notes that the scope of Article XI:1 of the GATT is broad and that any action or inaction could be considered as a measure restricting trade, whereas Article XI:2 of the GATT limits the scope of Article XI:1. The Commission focused its analysis on whether Mexico's measure constitutes a "*quantitative restriction*" and whether such measure can be justified under Article XI:2(b) of the GATT, which allows "*import and export prohibitions or restrictions necessary to the application of standards*". The report notes that, for a restrictive measure to be justified under Article XI:2(b) of the GATT, the measure must concern "*standards for the marketing of commodities in international trade*" and "*be necessary for the application of such standard*". The report further notes that the CTR's refusal to issue the export certificates "*is a consequence of the application of the Mexican Tequila technical standard, which concerns both production and commercialisation of the Tequila*" and that such measure appears to concern a standard for the marketing of such product. Additionally, the report notes that the refusal to issue the export certificates "*refers to the use of 'Tequila' spirit following its exportation, and not the intrinsic qualities or application of quality standards*" for the '*Tequila*' to be exported. According to the report, "*if 'use' of the exported spirit in this sense can be distinguished from the application of a quality standard for the marketing of the exported spirit, the Mexican measures might not be covered by Article XI:2(b)*" of the GATT. Consequently, the report concludes that, on the basis of the available evidence, Mexico's measure "*appears to be inconsistent with Article XI*" of the GATT.

The Commission's report notes that the EU and Mexico are in the process of ratifying the modernised EU-Mexico Association Agreement and considers that launching a WTO action could be counter-productive for the conclusion of the Agreement. Additionally, the Commission recognises that Mexico's standards agency (*i.e.*, *Direccion General de Normas*, hereinafter, DGN) is also conducting an investigation concerning the CTR's refusal to issue the export certificate and the possible violation of various Mexican norms, as well as the 1997 EU-Mexico Agreement on the mutual recognition and protection of designations for spirit drinks by *Tequila del Señor*. The DGN is also investigating the possible adulteration of *Tequila del Señor*'s '*Tequila*' spirit in the EU. Therefore, the reports concludes that the EU should continue monitoring the issue and that, depending on the outcome of the additional investigation, the Commission should then reconsider whether or not to initiate an action before the WTO.

It is important to note that Mexico had repeatedly raised concerns within the *EU-Mexico Spirits Committee* under the 1997 EU-Mexico Spirits Agreement regarding the use of the term '*Tequila'* by *Heineken NV*. The CTR argued that the '*Desperados*' drink violates Mexico's geographical indication for '*Tequila'* under EU law by using the term '*Tequila*', which abuses the reputation of the liquor and is "*confusing and misleading the European consumers*". In 2017, the CTR lodged complaints in France and the Netherlands against *Heineken NV*. The French court declined its competence and suspended the proceeding due to the ongoing procedure in the Netherlands. The court of the Netherlands had rejected the CTR's request in 2019, a decision which the CTR appealed. This appeal proceeding is still pending.

The way forward

The two recent examinations by the Commission under the EU's Trade Barriers Regulation are another indication that the Commission is placing greater emphasis on ensuring the implementation and enforcement by trading partners of their trade commitments. Economic operators should make use of the EU's tools to address trade restrictions in third countries, for instance via the EU's Single Entry Point complaint mechanism.

Indonesia's concept of *'exporters and importers with good reputation'*: Benefitting from the automatic issuance of export and import approvals

On the basis of *Law No. 11 Year 2020 concerning Job Creation*, which aims at improving Indonesia's investment ecosystem, the Government of Indonesia introduced the notion of *'exporters and importers with good reputation'.* This appears to follow the provisions of the *Job Creation Law* that intend to increase the ease of doing business and to simplify business licensing. According to Article 17 of *Government Regulation No. 29 Year 2021 concerning Organization of Trade Sector* (hereinafter, *GR No. 29/2021*), an implementing regulation to the *Job Creation Law*, Indonesia's Minister of Trade may designate *'exporters and importers with good reputation'*. Exporters and importers that have been classified as having a good reputation will benefit from a simplified business licensing process.

Criteria to achieve 'good reputation' status

In order to implement Article 17 of *GR No. 29/2021,* on 1 April 202, Indonesia's Ministry of Trade issued *Minister of Trade Regulation No. 17 Year 2021 concerning Exporters and Importers with Good Reputation* (hereinafter, *MOT Regulation No. 17/2021*), which entered into force on 1 June 2021. In essence, *MOT Regulation No. 17/2021* sets out a new regulatory framework that establishes the criteria and procedures for the designation of exporters and importers with a good reputation. Exporters and importers with a good reputation are defined as "*individuals, institutions or business entities, whether legal or non-legal entities, which carry out export and import activities, and have a good track record of compliance with laws and regulations in the export and import sector*".

On behalf of the Minister of Trade, the Director General of Foreign Trade designates the exporters and importers that may benefit from the simplified business licensing process. Ministries and other government agencies may recommend exporters and/or importers with a good reputation. To attain '*good reputation*' status, exporters and importers must fulfil the following requirements, as stipulated in Articles 3 and 4 of *MOT Regulation No. 17/2021*:

Exporters	Importers
1. Have fulfilled the obligation to report the realisation of all export approvals that have been made for each commodity over the past year in accordance with the laws and regulations; 2. Have obtained a valid taxpayer status from the Ministry of Finance for the past two years; 3. Have exported goods in the last two years in accordance with the relevant business sector or nature of the business; 4. Have never been subject to administrative sanctions in the form of a revocation of licensing for violations of export regulations during the past two years; 5. Have not been subject to administrative sanctions in the form of a written warning, the suspension of	1. Are classified as '*importer producer*' (*i.e.*, economic operators that carry out import activities of goods that are to be used as production raw materials or similar); 2. Have fulfilled the obligation to report the realisation of all import approvals that have been made for each commodity in the past year in accordance with the laws and regulations; 3. Have obtained a valid taxpayer status from the Ministry of Finance for the past two years; 4. Have imported of goods in the past two years in accordance with the relevant business sector or nature of the business; 5. Have never been subject to administrative sanctions in the form of the revocation of licenses

licenses, or the freezing of licenses for violations of export regulations; and 6. Have never been subject to criminal sanctions in the trade sector.	for violations of import regulations during the past two years; 6. Have not been subject to administrative sanctions in the form of a written warning, the suspension of licenses, or the freezing of licenses for violations of import regulations; and 7. Have never been subject to criminal sanctions in the trade sector.

Notwithstanding the above requirements, the Director General of Foreign Trade within the Ministry of Trade may also designate the following economic operators with '*good reputation*' status: 1) Exporters and importers that have been recognised as an Authorised Economic Operator (AEO) or as a Main Partner of Customs (*i.e.*, *Mitra Utama Kepabeanan* or MITA) by the Directorate General of Customs and Excise within the Ministry of Finance; or 2) Exporters that have received the *Primaniyarta* Award, which is the highest award given by the Government of Indonesia to exporters that excel in increasing the value of their exports, and which has been awarded by the Minister of Trade since 2018.

Procedures for designating exporters and importers with good reputation

MOT Regulation No. 17/2021 does not state whether or not the designation will have to be made based on an application by the respective exporter or importer. Article 8 of *MOT Regulation No. 17/2021* merely states that, in order to grant the '*good reputation*' status, the Minister forms an Assessment Team, which consists of representatives from the Directorate General of Foreign Trade, the Directorate General of Consumer Protection and Trade Compliance, and the Directorate General of National Export Development. The Assessment Team is responsible for, *inter alia*, identifying exporters and importers with a good reputation, carrying out an assessment of the fulfilment of applicable requirements, and conducting an evaluation of compliance. In carrying out its duties, the Assessment Team may also conduct audits, field verifications, and ask for considerations from other Ministries and Government agencies, if considered necessary. In view of Article 8 of *MOT Regulation No. 17/2021*, it appears that the '*good reputation*' status would be granted by the Government of Indonesia based on its own initiative and discretion, in accordance with the determined requirements, rather than based on applications submitted by the relevant business actors.

Validity period and reasons for the revocation and freezing of '*good reputation*' status

The exporters and importers, which have fulfilled the criteria mentioned above, benefit from the '*good reputation*' status from the date of designation by the Director General of Foreign Trade and until such designation is revoked. Article 5 of *MOT Regulation No. 17/2021* states that, with respect to the designation of exporters and importers with a good reputation, which have been recognised as Authorised Economic Operators or as Main Partners of Customs, the status is valid until the recognition is revoked by the Director General of Customs and Excise of the Ministry of Finance or until the '*good reputation*' status is revoked.

In certain cases, Indonesia's Ministry of Trade has the authority to revoke or suspend the designation of '*good reputation*' status. On the basis of Article 10 of *MOT Regulation No. 17/2021,* the designation of exporters and importers with '*good reputation*' status may be suspended if, based on a compliance assessment and evaluation, the respective economic operator is found to be incompliant with the applicable requirements or is under investigation for alleged criminal acts in the trade sector. The designation of such economic operators may also be suspended if they are subject to Customs sanctions by the Directorate General of Customs and Excise. The reasons for the revocation of the designation include the abuse of business licensing in the export and import sectors, non-compliance with the provisions in the export and import sectors determined by decision of a permanent court, or the suspension of the designation of an exporter and importer with a good reputation three times in a row within a period of three years.

Simplified issuance of export and import approvals

According to Article 6 of *MOT Regulation No. 17/2021,* exporters and importers benefitting from '*good reputation*' status benefit from a simplified procedure to obtain business licenses in the trade sector, namely in the form of an automatic and electronic issuance of export and import approvals for certain goods. The types of business licensing that are subject to this provision are listed in the Appendix of *MOT Regulation No. 17/2021,* which refers to 9 export approvals and 77 import approvals.

The relevant export approvals concern: 1) Black glutinous rice; 2) Medium rice; 3) Organic rice; 4) Premium rice; 5) Animal and animal products; 6) Natural plants and wild animals; 7) Other fuels (*i.e.*, fuel in the form of liquid or gas originating from other than oil, natural gas and processed products); 8) Non-subsidised urea fertiliser; and 9) Scrap and metal scrap. The relevant import approvals concern various sectors, including agricultural products, cement; cellular phones; and petroleum and natural gas.

MOT Regulation No. 17/2021 does not define or further specify what *'automatic'* issuance refers to. However, on the basis of *Government Regulation No. 5 Year 2021 concerning Organization of Risk-Based Business Licensing* (*GR No. 5/*2021) and its implementing regulations, it may be implied that, in this context, '*automatic'* refers to the automatic and electronic processing of business licensing via Indonesia's *Online Single Submission* (OSS) system (*i.e.*, an integrated electronic system managed and maintained by the OSS Institution for the administration of risk-based business licensing). The OSS system was launched on 9 July 2018 as the Government of Indonesia's online platform to process licenses, including operational and business licenses. Export and import approvals are among the business licenses that fall within the scope of the OSS system. This means that the Government of Indonesia, in this case the Minister of Trade, will issue the export and import approvals directly online, once the necessary data, information, commitments, and/or technical requirements for the respective goods have been fulfilled by the applicants, as opposed to the process of manual validation by the relevant agencies/institutions, which could take several days to be completed. Through this approach, the organisation of the licensing procedure is simplified and more effective, as not all business activities have to go through manual validation or issuance of export and import approvals.

A positive development in terms of trade facilitation?

The introduction of the concept of exporters and importers with a good reputation in Indonesia appears to be a positive development, as it could accelerate export and import activities, as well as encourage the economic operators in the relevant industries to become more competitive. However, as the Government has yet to issue more detailed rules to clarify *MOT Regulation No. 17/2021,* it appears that the Minister of Trade would designate exporters and importers with a good reputation on a case-by-case basis, rather than through applications and a codified process. The absence of a general application process, coupled with the current lack of transparency regarding the detailed procedures for the designation, may still lead to uncertainties and arbitrary decisions. Nevertheless, economic operators should closely monitor the related developments and, at the same time, make efforts to comply with the relevant requirements in order to benefit from the '*good reputation*' status and the related simplified procedures.

The European Parliament has withdrawn the so-called '*Amendment 171*' – Are the descriptions '*creamy*' and '*buttery*' for plant-based alternatives to dairy products now allowed?

On 26 May 2021, the European Parliament has withdrawn the so-called '*Amendment 171*' in the course of the EU's '*trilogue*' negotiations, in which the European Parliament, the Council

of the EU, and the European Commission negotiate changes to the EU's Common Agricultural Policy (CAP). While the issue of the descriptions for plant-based alternatives to dairy products can be considered minor vis-à-vis the broader debate on the future of the CAP, it has been heavily debated in the past and received significant media coverage. While terms like '*vegan cheese*' or '*oat milk*' are already prohibited in the EU, Amendment 171 with its broad language would have gone further, seeking to prohibit any '*imitation or evocation*' of dairy products and banning any descriptive terms such as '*buttery*' and '*creamy*' for dairy-free products. This article reviews the *TofuTown* judgement of the CJEU, which mostly settled the legal debate on '*plant-based*' '*dairy*' names, the applicable EU rules, and whether terms like '*creamy*' and '*buttery*' are now permitted for plant-based alternatives to dairy.

The debate on descriptions for 'plant-based' alternatives: What's in a name?

In the EU, there is an ongoing debate on the legality of denominations of '*plant-based*' alternatives to '*dairy*' products, such as almond milk, tofu butter, soymilk, oat milk and vegan mozzarella cheese.

The legal debate on '*plant-based*' '*dairy*' names was mostly settled in 2017, when the Court of Justice of the European Union (hereinafter, CJEU) handed down its judgment in Case C-422/16 *TofuTown*. The German company *TofuTown* promoted and distributed purely plant-based products under the designations '*Soyatoo Tofu butter*', '*Plant cheese*', '*Veggie Cheese*', '*Cream*' and other similar designations. The CJEU held that purely plant-based products, such as tofu or soya, cannot, in principle, be marketed with designations such as '*milk*', '*cream*', '*butter*', '*cheese*' or '*yoghurt*', which, under EU law, are reserved for animal-derived dairy products. According to the CJEU, the same applies even if those designations are accompanied by clarifying or descriptive terms indicating the plant origin of the product concerned and/or the indication that the product does not contain animal products. In its judgment, the CJEU observed that, in principle, for the purposes of the marketing and advertising in question, the relevant EU legislation reserves the term '*milk*' only for milk of animal origin. In addition, except where expressly provided in the law, such legislation reserves designations, such as '*cream*', '*butter*', '*cheese*' and '*yoghurt*', solely for products derived from milk. Thereby, the CJEU interpreted the term '*milk*' and the respective terms for milk products very narrowly.

The applicable rules on 'dairy' terms

Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products (Single CMO Regulation) defines '*milk*' in Point 1 of Part III of Annex VII as "*exclusively the normal mammary secretion obtained from one or more milkings without either addition thereto or extraction therefrom*". Point 2 of Part III of Annex VII of *Regulation (EU) No 1308/2013*) then lists the following designations of milk products that may be used at all stages of marketing only for products derived from milk: whey, cream, butter, buttermilk, butteroil, caseins, anhydrous milk fat (AMF), cheese, yogurt, kephir, koumiss, viili/fil, smetana, fil; rjaženka, and rūgušpiens. A list of exceptions to the principle that the descriptions of milk and milk products may not be used for milk products other than those in Annex VII is contained in *Commission Decision 2010/791/EU of 20 December 2010 listing the products referred to in the second subparagraph of point III(1) of Annex XII to Council Regulation (EC) No 1234/2007* (the previous Single CMO Regulation).

EU Member States were required to notify to the Commission an indicative lists of products, which they deemed meeting, within their own jurisdictions, the criteria for the abovementioned exception. In its judgment, the CJEU mentioned, as an example of such products notified to the Commission, the product traditionally designated '*crème de riz*' (*i.e.*, rice porridge) in French. Other examples are peanut or cocoa butter, as well as almond milk in various languages, or the German *Leberkäse* (*i.e.*, a meatloaf) and the Italian *Fagiolini al burro* (*i.e.*, a type of beans). The number of such exceptions notified to the Commission varies significantly

depending on the language: for example, there are 21 designations in German, only one in Spanish, and none in Bulgarian or Czech. Importantly, point 5 of Part III of Annex VII to *Regulation (EU) No 1308/2013* provides that the "*designations referred to in points 1, 2 and 3* [concerning composite names for milk products] *may not be used for any product other than those referred to in that point*".

Amendment 171 on restrictions of 'dairy' terms

As part of the revision of *Regulation (EU) No 1308/2013* in the context of the negotiations on the future CAP, in May 2019, the European Parliament's Committee on Agriculture and Rural Development (AGRI) adopted Amendment 171, and the European Parliament's plenary voted in favour of it on 23 October 2021. Amendment 171 was, thus, included in the *Amendments adopted by the European Parliament on 23 October 2020 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products*.

Amendment 171 proposes to replace the abovementioned point 5 of Part III of Annex VII *Regulation (EU) No 1308/2013* by the following: "*5. The designations referred to in points 1, 2 and 3 may not be used for any product other than those referred to in that point. Those designations shall also be protected from: (a) any direct or indirect commercial use of the designation; (i) for comparable products or products presented as capable of being substituted not complying with the corresponding definition; (ii) in so far as such use exploits the reputation associated with the designation; (b) any misuse, imitation or evocation, even if the composition or true nature of the product or service is indicated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "substitute", "like" or similar; (c) any other commercial indication or practice likely to mislead the consumer as to the product's true nature or composition. However, this provision shall not apply to the designation of products the exact nature of which is clear from traditional usage and/or when the designations are clearly used to describe a characteristic quality of the product*".

At the time of adoption of the amendment, the *European Dairy Association* (EDA) noted that the protection of dairy terms is crucial to the sector and that "*non-dairy products cannot hijack our dairy terms and the well-deserved reputation of excellence in milk and dairy*".

Now that the European Parliament has withdrawn the so-called '*Amendment 171*' in the course of the EU's '*trilogue*' negotiations, in which the European Parliament, the Council of the EU, and the European Commission negotiate changes to the EU's Common Agricultural Policy (CAP), *ProVeg International*, a non-governmental organisation that works in the field of food system change and towards reducing the global consumption of animals by 50% by 2040, is quoted saying that while "*common sense has prevailed*", it would be "*important to remember the existing restrictions remain: we still cannot refer to plant milk or oat cream. So we have protected the status quo, but a deeply restricted status quo*".

Without specific rules, general food information rules on misleading advertising apply

Now that the very specific Amendment 171, establishing commercial indications or practices likely to mislead the consumer as to the product's true nature or composition, has been withdrawn by the European Parliament, the general prohibition to use the term '*milk*' established in Part III of Annex VII of *Regulation (EU) No 1308/2013* and the general EU food information rules continue to apply to such products.

Arguably, certain labels and practices by food business operators could still constitute misleading advertising under Article 7 of *Regulation (EU) No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers* (hereinafter, FIR) on '*fair information practices*'. Paragraph 1(a) of Article 7 of the FIR states that "*Food information shall not be misleading, particularly as to the characteristics of the food and, in particular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production*". In

addition, Paragraph 1(d) provides that "*Food information shall not be misleading, particularly by suggesting, by means of the appearance, the description or pictorial representations, the presence of a particular food or an ingredient, while in reality a component naturally present or an ingredient normally used in that food has been substituted with a different component or a different ingredient*".

The EU judiciary assesses how the "*average consumer, who is reasonably well informed and reasonably observant and circumspect*" could understand, based on the label and marketing in a specific case, that a product is a dairy product. If, in a specific case, terms like '*buttery*' or '*creamy*' are accompanied with, for example, images of a cow or even if a product is presented in the typical form of a butter package, an average consumer may be misled as to the true nature of the product, which does not contain, in fact, dairy ingredients. In the judgment of 4 June 2015 in Case C-195/14 *Teekanne*, the CJEU acknowledged that average consumers, who are reasonably well informed and reasonably observant and circumspect, whose purchasing decisions depend on the composition of the products in question, will read the list of ingredients, but could still be misled.

The debate on descriptions for '*plant-based*' alternatives to dairy products like '*buttery*' or '*creamy*' will likely go on and will have to be addressed on a case-by-case basis, determining whether or not operators have exceeded the limits of EU food information law.

Recently Adopted EU Legislation

Trade Law

- *Decision No 1/2021 of the EU-Colombia-Peru-Ecuador Trade Committee of 17 May 2021 amending Appendix 1 of Annex XII (Government Procurement) to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Peru and Ecuador, of the other part (2021/894)*

Trade Remedies

- *Commission Implementing Regulation (EU) 2021/863 of 28 May 2021 initiating an investigation concerning possible circumvention of the countervailing measures imposed by Implementing Regulation (EU) 2020/776 on imports of certain woven and/or stitched glass fibre fabrics originating in People's Republic of China and Egypt by imports of certain woven and/or stitched glass fibre fabrics consigned from Morocco, whether declared as originating in Morocco or not, and making such imports subject to registration*

- *Commission Implementing Regulation (EU) 2021/864 of 28 May 2021 initiating an investigation concerning possible circumvention of the anti-dumping measures imposed by Implementing Regulation (EU) 2020/492 on imports of certain woven and/or stitched glass fibre fabrics originating in People's Republic of China and Egypt by imports of certain woven and/or stitched glass fibre fabrics consigned from Morocco, whether declared as originating in Morocco or not, and making such imports subject to registration*

- *Commission Implementing Regulation (EU) 2021/866 of 28 May 2021 suspending commercial policy measures concerning certain products originating in the United States of America imposed by Implementing Regulation (EU) 2018/886*

Food Law

- *Commission Regulation (EU) 2021/899 of 3 June 2021 amending Regulation (EU) No 142/2011 as regards transitional measures for the export of meat-and-bone meal as a fuel for combustion (1)*

- *Commission Implementing Regulation (EU) 2021/900 of 3 June 2021 authorising a change of the conditions of use of the novel food 'galacto-oligosaccharide' under Regulation (EU) 2015/2283 of the European Parliament and of the Council and amending Commission Implementing Regulation (EU) 2017/2470 (1)*

- *Commission Implementing Regulation (EU) 2021/882 of 1 June 2021 authorising the placing on the market of dried Tenebrio molitor larva as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council, and amending Commission Implementing Regulation (EU) 2017/2470 (1)*

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