



## Issue No. 6 of 27 March 2020

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### **The implications of the Covid-19 pandemic on trade: regulators around the world implement trade-related measures, notably export restrictions**

On 17 March 2020, the President of the European Council, *Charles Michel*, and the President of the European Commission (hereinafter, Commission), *Ursula von der Leyen*, announced further EU actions in response to the Covid-19 outbreak. Since the pandemic reached Europe, the EU has adopted a number of trade-related measures, including the issuance of guidelines for national border management, as well as export authorisation measures. On 14 March 2020, the Commission adopted *Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation*, temporarily restricting exports of ‘*personal protective equipment*’ to destinations outside of the EU. Governments around the world are implementing trade-related measures in response to the Covid-19 pandemic, some trade-restrictive, but a number of countries have also called for the elimination of export controls and restrictions on essential goods. As the greater implications of the Covid-19 pandemic on trade are still difficult to assess, the emergency measures taken by affected countries already require for some legal scrutiny.

On 11 March 2020, the World Health Organization (hereinafter, WHO) declared the Covid-19 epidemic a pandemic. On 12 March 2020, the WHO’s Regional Director for Europe, *Dr. Hans Henri P. Kluge*, stated that the rapid escalation of Covid-19 in the European Region had shifted the centre of the epidemic to Europe.

In response to the Covid-19 pandemic, EU Member States endorsed the *Guidelines for border management measures*, in order to ensure the smooth passage of goods, particularly food, and medical and health supplies across their borders. The President of the Commission *von der Leyen* stated that the measure would only be effective if there was coordination at the EU level. She pointed out that it was important to ensure that “*goods and essential services continue to flow in our internal market*”, in order to prevent shortages of food and medical equipment. The guidelines set out “*principles for an integrated approach to an effective border management to protect health while preserving the integrity of the Single Market*”. Firstly, the guidelines recommend that, in relation to transport, EU Member States should impose transparent, science-based, proportionate, transport-mode specific and non-discriminatory measures. Furthermore, the measures should ensure unobstructed transport of essential goods, such as food and vital medical and health supplies. Secondly, EU Member States should preserve the free circulation within the Internal Market of all goods, particularly basic need products, such as medicines, medical equipment, and food products. No additional

certifications should be required for goods. Thirdly, EU Member States should designate priority 'green lanes' at their borders for freight transport. In this regard, on 23 March 2020, the Commission published a [\*Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services\*](#).

*Commission Implementing Regulation (EU) 2020/402* was adopted with the objective of ensuring the supply of 'personal protective equipment' in the EU. Prior to the adoption of this implementing act, at the beginning of March 2020, certain EU Member States, such as France and Germany, already imposed restrictions on exports of protective medical equipment, such as face masks. As these measures also applied to other EU Member States, they caused considerable disruption within the internal market and irritation among EU Member States. These national measures were removed when *Regulation (EU) 2020/402* entered into force. *Regulation (EU) 2020/402* introduces an export authorisation requirement for certain specified 'personal protective equipment' defined in Annex I of the Regulation and including, notably, protective spectacles and visors, face shields, mouth-nose-protection equipment, protective garments, and gloves. According to Article 3 of *Regulation (EU) 2020/402*, the regulation is to "apply for a period of six weeks" and will "automatically cease to apply at the end of this six weeks period". Businesses intending to export any such products are required to apply for an export authorisation with the competent EU Member States' authorities. Before granting an export authorisation, Article 2(3) *Regulation (EU) 2020/402* requires the competent authority to consider the export objective, to allow, for instance, coordinated EU efforts against Covid-19. On 19 March 2020, the Commission [\*amended Regulation \(EU\) 2020/402\*](#), exempting Andorra, the Faroe Islands, Liechtenstein, Norway, San Marino, Switzerland and the Vatican, as well as certain overseas territories, from the export restriction. The Commission adopted *Regulation (EU) 2020/402* and the amendment thereto via an urgency procedure in accordance with Article 5 of *Regulation (EU) 2015/479 of the European Parliament and of the Council on common rules for exports*. On 20 March 2020, the Commission published a [\*Guidance note to Member States related to Commission Implementing Regulation \(EU\) 2020/402 making the exportation of certain products subject to the production of an export authorisation, as last amended by Commission Implementing Regulation \(EU\) 2020/426\*](#), providing certain clarifications, including that exports to the UK would not be considered as exports to a third country.

The Commission underlined that the measure taken by the EU was a temporary export restriction and not an export ban and that it was in line with the EU's international obligations. Export restrictions are generally prohibited by world trade disciplines. Exceptions to this rule are only allowed in specific circumstances under Articles XI:2 and XX of the General Agreement on Tariffs and Trade (hereinafter, GATT). Article XI:2 of the GATT expressly allows "export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party" and Article XX(b) of the GATT allows measures "necessary to protect human, animal or plant life or health".

Even though the EU measure is temporary and conditional, its scope appears to already cause certain adverse effects. It appears that the reference to certain combined nomenclature (hereinafter, CN) codes in Annex I of *Regulation (EU) 2020/402* cover more than only the 'personal protective equipment' targeted by the Regulation. For instance, the Commission intended to restrict exports of face shields. This product falls under CN code 39269097, which is defined as "other articles of plastics and articles of other materials of headings 3901 to 3914 – other", which is much broader than just face shields. For instance, thousands of car parts, such as oil filter caps, fuel switch rounds and door trim fasteners, also fall under CN code 39269097, but are obviously not targeted by the EU export restriction. However, as customs inspections are linked to specific customs codes, it appears that the export of many car parts are currently being delayed, as customs authorities first need to inspect all shipments falling under this code to ensure that the export restriction is enforced. The same applies to several other codes listed in Annex I of *Regulation (EU) 2020/402*.

Similar export restrictions have been adopted by countries around the world, as Governments struggle to respond to the Covid-19 pandemic. On 18 March 2020, Indonesia's Ministry of Trade announced a temporary export ban on face masks, sanitisers and certain medical equipment until 30 June 2020. Reportedly, India has also banned exports of similar products, as well as of all types of ventilators and anti-malarial medicines. Importantly, it appears that such export restrictions are already causing a shortage of such products in certain countries looking to purchase them. According to *Adrian van den Hoven*, the Director General of *Medicines for Europe*, a trade association representing the European generic, biosimilar and valued added pharmaceutical industries, hospitals in Romania currently lack sufficient intravenous medicines, which are normally manufactured in Serbia and exported to Romania. However, as Serbia has closed its borders and restricted exports, the shipments are currently unavailable. Serbia is an important manufacturing centre not only for Romania, but also for other countries, such as Germany. Notably, trade restrictions already extend beyond '*personal protective equipment*'. On 22 March 2020, Kazakhstan, one of the world's most important exporters of wheat flour, banned all exports thereof. The ban also extends to carrots, sugar, and potatoes. Serbia has banned, *inter alia*, exports of sunflower oil, and, on 25 March 2020, the Prime Minister of Viet Nam, *Nguyen Xuan Phuc*, announced that all new rice export contracts would be suspended until a report on the country's rice stocks were available.

The impact of the increasing number of trade-related measures as part of Government responses to the Covid-19 pandemic are poised to significantly disrupt the global trading system, supply chains and trade flows. A shortage of certain products could lead to higher prices and endanger food security in certain countries. Therefore, on 25 March 2020, Australia, Brunei, Canada, Chile, Myanmar, New Zealand, and Singapore issued a [joint statement](#) urging countries to "*ensure that trade lines remain open, including via air and sea freight, to facilitate the flow of goods including essential supplies*". The countries underlined the importance of removing restrictions on essential goods and medical supplies, that they were committed "*to working with all like-minded countries to ensure that trade continues to flow unimpeded*", and that critical infrastructure, such as air- and seaports remained open "*to support the viability and integrity of supply chains globally*".

The World Trade Organization (hereinafter, WTO) has also taken up the issue and, on 24 March 2020, the WTO Director-General *Roberto Azevêdo* requested WTO Members to submit information to the WTO Secretariat regarding policies that WTO Members had introduced in response to the Covid-19 outbreak. According to Director-General *Azevêdo*, the information "*would be used purely for transparency purposes*", pointing out the importance of transparency with regard to trade-related measures and arguing that "*it would be particularly useful for the many countries that rely on imports for medical supplies*". Additionally, Director-General *Azevêdo* created a task force of experts from across the WTO Secretariat to monitor the impact of Covid-19 on trade flows and the overall global economy. Initial findings might already be published in April 2020.

The Covid-19 pandemic will likely take months to overcome and the impact on trade will be significant and lasting. Traders around the world should closely monitor the trade-related developments linked to Covid-19. The situation is changing dynamically and rapidly, but businesses should remain up to date on the measures in force and should seek adequate legal advice, also ensuring that their legitimate interests are properly voiced and represented within all relevant *fora*.

### **The EU and the UK exchange their text proposals for their future trade agreement: towards complex negotiations due to significant differences?**

On 18 March 2020, negotiators of the United Kingdom (UK) and the European Union (EU) exchanged draft texts containing their proposals for the envisaged future EU-UK *Agreement on the New Partnership*. Following *Brexit*, the EU and the UK entered into a transition period, which should end on 31 December 2020, during which both sides intend to negotiate and



conclude a preferential trade agreement. While the EU has published its proposal for [draft text of the agreement](#), the UK has only confidentially shared its text proposal with the EU. The exchange of the draft agreements followed the first round of negotiations that was held in Brussels from 2 to 5 March 2020. The draft texts were originally supposed to feed into the next round of negotiations, which had been scheduled to take place from 18 to 20 March 2020, but this round has now been suspended due to the Covid-19 pandemic, and both sides are trying to find a way to maintain their dialogue open, even though the previously scheduled negotiating rounds have been cancelled.

For the time being, the transition period will avoid what has been referred to as a '*hard*' *Brexit*. During the transition period, the UK remains part of the EU Customs Union and the EU Single Market. Therefore, trade in goods and services between the EU, the UK and other WTO Members remains, *de jure*, largely unaffected at least until the end of the year. In case the EU and the UK were not to conclude an agreement before the end of the transition period, and if no extension were to be agreed, the EU-UK trade relationship would be governed by WTO rules, eventually leading to the so-called '*hard*' *Brexit*.

While the EU and the UK have always underlined their optimism and good will to reach an agreement, both sides have also displayed severe differences. The UK's agenda appears guided by the objective to regain its sovereign powers, seeking to limit interference by and binding commitments to external actors. The EU's primary concern is to contain the economic implications of *Brexit*, as well as to achieve a balance between a fruitful economic partnership, on the one hand, and emphasising the consequences of the UK's withdrawal from the EU, on the other hand.

The draft text of the EU, as well as official statements made by EU and UK negotiators, are evidence of the parties' fundamentally different approaches to their future trade relationship. The EU's draft text highlights its approach to the EU-UK negotiations, which is rooted in the preservation of EU law and the UK's alignment to EU standards. Article 14 of the EU's draft text illustrates this approach, noting that "*Concepts of Union law contained in this Agreement [...] or provisions of Union law referred to in this Agreement [...], shall in their application and implementation be interpreted in accordance with the methods and general principles of Union law and in conformity with the case-law of the Court of Justice of the European Union*". As the draft text does not include a definition of what is to be understood as "*concepts of Union law*", it also does not set clear-cut limits to the scope of application of this provision. It may, therefore, be read as a far-reaching claim of the EU to establish EU law and its interpretation by the Court of Justice of the EU (CJEU) as the primary point of reference.

So far, it appears that the UK has not yet reacted to the EU's draft text. The UK's Prime Minister *Boris Johnson* said that *Brexit* was currently not being discussed much, given the demands of the response to the Covid-19 pandemic. However, previous statements by UK officials may be indicative of the UK's position on the matter. UK representatives have repeatedly underlined an approach to the negotiations that appears to be in stark contrast to that of the EU. During a [speech](#) in Brussels, on 17 February 2020, the UK's Chief *Brexit* Negotiator *David Frost* detailed the UK's vision for the negotiations, stating that the UK must have the ability to set laws that suit its interests, underlining that "*to think that we might accept EU supervision on so-called level playing field issues simply fails to see the point of what we are doing. That isn't a simple negotiating position which might move under pressure – it is the point of the whole project*".

As pointed out by UK Chief Negotiator *Frost*, the so-called *level playing field* issues are the fault lines where the different approaches will most clearly emerge. The reference to the *level playing field* can be understood as the creation of a set of rules and standards preventing businesses on one side from undercutting their rivals and gaining a competitive advantage over those operating on the other side. According to the EU draft text, the EU aims at creating such rules in the areas of: 1) State aid control; 2) Competition; 3) State-owned enterprises; 4) Taxation; 5) Labour and social protection; 6) Environment and health; 7) The fight against climate change; and 8) Other instruments for trade and sustainable development. The *level*

*playing field* is supposed to ensure the equivalence of the respective domestic provisions in these policy areas.

In its text proposal, the EU included a Title III on '*Level Playing Field and Sustainability*' (hereinafter, LPFS). As general principles for the *level playing field*, Article LPFS.1.1(4) of the EU's draft text provides that the Parties "*agree to establish long-lasting and robust commitments that prevent distortions of trade and unfair competitive advantages*", and, according to Article LPFS.1.1(5) thereof, the Parties "*affirm their commitment to continue improving their respective levels of protection*". The latter is evidence of the EU's demand for mutual guarantees that future domestic regulation may not go below the levels of protection provided in the agreement. Such a '*non-regression*' clause is expressly proposed in Article LPFS.2.27 of the EU's draft text regarding labour and social protection. The *level playing field* commitments are legally and politically sensitive because they restrict domestic rule making and raise questions as to which jurisdiction is competent to solve disputes. UK Chief Negotiator Frost highlighted these concerns in his speech of 17 February 2020, noting that "*such an approach would compromise*" a Party's "*sovereign legal order*" and "*that such decisions are so fundamental to the way the population of a territory feels bound into the legitimacy of its government, that this structure would be simply unsustainable*".

The relevance of the question of jurisdiction and interpretation is illustrated by the repeated reference that the EU's draft text makes to specific provisions of EU law. For example, the *level playing field* provisions on State aid (Article LPFS.2.1 to LPFS.2.9 of the EU's draft text) repeatedly refer to Article 108 of the Treaty on the Functioning of the European Union (TFEU), which regulates sanctioning procedures in case of infringements of State aid regulations. And, in Article LPFS.2.6(2) thereof, the EU's draft text proposes that the UK "*shall ensure that, when [...] a question of interpretation of a concept of Union law or a question of interpretation of a provision of Union law referred to in the acts and provisions listed in ANNEX LPFS-X [i.e. a list of State aid acts and provisions of the UK authorities which affect EU/UK trade] arises, courts or tribunals in the United Kingdom may request the Court of Justice of the European Union to give a preliminary ruling on the question. The Court of Justice of the European Union shall have jurisdiction to give such a ruling and such ruling shall be binding on the referring courts or tribunals of the United Kingdom*". Even though, according to the provision, it is not mandatory for UK Courts and tribunals to refer such questions to the CJEU, the decisions of the CJEU would still be binding on the UK's referring Courts or tribunals. Considering the remarks of UK Chief Negotiator Frost, this appears to be incompatible with the UK's approach to the negotiations in general and to the *level playing field* issue in particular.

In addition to the sensitive area of the *level playing field*, the different approach to the future partnership will presumably mainly become evident in the areas of dispute settlement and fishery policy. In the EU's draft text, dispute settlement is regulated in Articles 9 to 34 of the Title on the *Institutional Framework* (hereinafter, INST). The draft text provides for a two-tiered dispute settlement procedure with consultations as the first step (Articles INST.12 to 14) and an arbitration procedure (Article INST.15) as second step. However, the EU's draft text contains a far-reaching exemption clause regarding the competences of the arbitration tribunal. According to Article INST.16 of the EU's draft text, whenever a dispute raises a question of EU law, "*the arbitration tribunal shall not decide on any such question. In such case, it shall request the Court of Justice of the European Union to give a ruling on the question. The Court of Justice of the European Union shall have jurisdiction to give such a ruling which shall be binding on the arbitration tribunal*". The demand for the UK to accept CJEU-rulings will most likely be rejected by UK negotiators.

The EU draft text also contains a whole section on the future regulation of fisheries. Including a chapter on fishery policy appears to be in line with recent statements made by EU Chief Negotiator Michel Barnier, who said that any EU-UK trade agreement would "*have to include a balanced solution for fisheries*". However, this approach contradicts the claim of the UK's Secretary of State for the Department of Environment, Food and Rural Affairs (DEFRA), George Eustice, of 4 March 2020, that fisheries would not be part of the EU-UK trade agreement in order to avoid the fishery sector being used as a '*bargaining chip*' for concessions

in other areas. In general terms, the UK would prefer not to conclude one comprehensive deal, but rather individual agreements for specific sectors. Apart from these differences regarding the broader approach, the UK and the EU also appear to be divided in terms of the substance of fishery regulation. In Article FISH.10(1) on '*Reciprocal access to waters*', the EU's draft texts provides that *"Each Party shall authorise the fishing vessels of the other Party to engage in fishing activities in its waters in accordance with the provisions set out in ANNEX FISH-3."* Annex 3 would allow for the catching of all sea fish species in waters outside twelve nautical miles from the baselines and includes a comprehensive list of fish that each party would be allowed to catch in the areas between six and twelve nautical miles from the baselines. This, however, contrasts with the UK's viewpoint as defined by Secretary *Eustice*, who noted that the UK would *"take full control"* of UK waters and that it would be *"up to us to decide who can access our waters and on what terms"*.

While some may have hoped that the EU's draft text might deliver more clarity regarding the future EU-UK trade relationship, it appears that it only reconfirms the known differences. While it is still unclear when and how the EU-UK negotiations would resume, complex negotiations can be expected in the areas outlined above and beyond. Businesses in the EU and the UK should define their priorities and engage with interlocutors on both sides of the Channel.

### **German Court rules that the claim "*without artificial colourings*" is permitted on the labelling of fruit gums coloured with plant and fruit extracts**

Driven by consumer demand, there is an ongoing trend of so-called '*clean*' labels in the EU, with food manufacturers pursuing the simplest and most authentic list of ingredients possible. One area within this trend relates to the manner in which food products are visually altered in terms of colour, where some manufacturers increasingly use '*colouring foods*', while others use food additives in the sense of *Regulation (EC) No 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives*. In simple terms, '*colouring foods*' are food extracts with colouring properties. When it comes to '*clean*' labels, the confectionery sector is no exception. Candies and other sweets often have long ingredients lists, including many food additives. With rising concerns about artificial colourings and their adverse effects on children, consumers are becoming increasingly vigilant about what they buy, and labels are being simplified to comply with these demands. On 10 December 2019, the Freiburg (Germany) Administrative Court ruled that confectionery manufacturers are allowed to advertise with the claim '*without artificial colourings*', if fruit gums are coloured with plant and fruit extracts.

A German confectionery manufacturer produces fruit gums, which obtain their colourful colours through plant and fruit extracts. According to the list of ingredients, the fruit gums contain the following: *"glucose syrup; sugar; starch; gelatine; acidifiers: citric acid, malic acid; fruit and plant concentrates: elderberry, blackcurrant, orange, lemon, apple, carrot, radish, hibiscus, sweet potato, spirulina, safflower; aroma; acidity regulators: tricalcium citrate, sodium hydrogen malate; coating agent: carnauba wax; caramelized sugar syrup; invert sugar syrup"*. On the back of the pack, the manufacturer advertises with the words *"without artificial colourings"*. An expert report commissioned by the German Land of Baden-Württemberg found that the declaration *"without artificial colourings"* on the pack was misleading because legislation did not provide for a differentiation of artificial and non-artificial colourings. The expert report referred to *Opinion No. 2016/26* of the Working Group of Food Chemical Experts of the Länder and the Federal Office for Consumer Protection and Food Safety (ALS in its German acronym) of 21 and 22 September 2016, which states that: *"As defined in Regulation (EC) 1333/2008, colourings are in principle additives subject to authorisation. A differentiation into 'artificial' or 'non-artificial' colourings is not made by the legislator and cannot be inferred from the specifications for food additives of Commission Regulation (EU) No 231/2012 laying down specifications for food additives. Information on food must be accurate, clear and easy for consumers to understand. Information voluntarily provided to consumers must not be ambiguous or confusing. Any reference to 'artificial' colourings is not easily comprehensible*



due to the lack of differentiation to ‘non-artificial colourings’ and is therefore suitable for misleading’. The competent local authority stated that the designation ‘without artificial colouring’, therefore, infringed 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) and informed the public prosecutor’s office about a possible violation of the German Food and Feed Code.

The confectionery manufacturer brought an administrative action to establish that the label ‘without artificial colourings’ does not violate the FIR. The Administrative Court in Freiburg upheld the action, stating that the claim “without artificial colourings” does not infringe the FIR, neither the prohibition of misleading advertising, nor the prohibition of self-evident advertising. In its judgement of 10 December 2019, the Court held that the labelling is not misleading. According to the Court, information is suitable for deception if it does not correspond to the actual facts, according to which there is a divergence of the ‘actual state’ and the ‘should-state’, which is therefore capable of at least raising inaccurate ideas about the product to the public concerned. In this case, the idea of the consumer corresponds to the actual situation, since, according to the list of ingredients, the colouring of the confectionery was achieved solely by the use of colouring plant and fruit extracts. Contrary to the view of the defendant and the ALS, the Court held that the average consumer would correctly understand that no chemical substances had been used to colour the colourful fruit gums. For the Court, it is not decisive that the plant and fruit extracts used for colouring the fruit gum are not themselves regarded as colourings, according to Regulation (EC) No. 1333/2008, and that there is no legal distinction between artificial (i.e., indicating that something is not natural, but has been reproduced by chemical or technical means) and non-artificial colouring. Rather, to the Court, the general use of language, to which such a distinction between artificial and non-artificial colouring is not unknown, is decisive. For example, the Court noted that the term ‘artificial colourings’ has been the subject of press coverage, after British researchers found a link between hyperactivity in children and the consumption of sweets with certain colourings.

Secondly, the Court held that the “without artificial colouring” claim is not ‘self-evident’ and ‘misleading’ advertising, according to Article 7(1)(c) of the FIR, which 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”. The Court held that “being free from colouring within the meaning of the Food Additives Regulation is a special feature, since not all confectionery of this type must be free of colourings”. The Court further held that “the label ‘without artificial colourings’ allows the manufacturer to point out to the average consumer in a simplified manner that the confectionery product does not contain colourings which may be likely to have a negative impact on the concentration of children. The average consumer also has a legitimate interest in information about which colourings are used because of the potentially harmful effects of certain colourings”.

Arguably, the absence of (artificial) colourings is not a special feature of the fruit gums. The list of ingredients lists glucose syrup; sugar; starch; gelatine; acidifiers: citric acid, malic acid; fruit and plant concentrates: elderberry, blackcurrant, orange, lemon, apple, carrot, radish, hibiscus, sweet potato, spirulina, safflower; aroma; acidity regulators: tricalcium citrate, sodium hydrogen malate; coating agent: carnauba wax; caramelized sugar syrup; invert sugar syrup (emphasis added). The “without artificial colouring” claim is arguably ‘self-evident’ and ‘misleading’ advertising, according to Article 7(1)(c) of the FIR because the list of ingredients already informs the consumer that there are no artificial colourings and that the only colouring agents are certain fruit, plant and seaweed (i.e., spirulina) concentrates. The product of the confectionary manufacturer is arguably in no way special, compared to competitors’ products, which also do not contain artificial colourings according to the list of ingredients and that are colouring the product with colouring foods only, but not claiming to be ‘without artificial colourings’. It must also be noted that, since 20 July 2010, Annex V to Regulation 1333/2008 applies, which provides that foods containing one or more of the following food colours Sunset yellow (E 110), Quinoline yellow (E 104), Carmoisine (E 122), Allura red (E 129), Tartrazine (E 102), and Ponceau 4R (E 124) are required to include the additional information: “may have

*an adverse effect on activity and attention in children*". Therefore, consumers receive information about potentially harmful effects of certain colourings and there does not appear to be a reason for an additional "*without artificial colouring*" label.

Given the trend by manufacturers and retailers to promote the natural characteristics of their products, it appears to be preferable for many to use '*colouring foods*' (in particular in confectionary, dairy products and soft drinks) to make products visually more attractive to the younger population. Being able to specify the extracts that are used in food products appears to enhance the natural image of a product. '*Colouring foods*' may be considered food ingredients rather than food additives (in this case colourings) and, as such, would not require to be designated in the products' lists of ingredients on the label by the name of their functional class, followed by their specific name or E-number laid down in *Regulation (EC) No. 1333/2008*, such as: "*colouring: chlorophylls*" or "*colouring: E 140*", which to consumers might appear artificial.

However, it is not always clear whether or not a substance used in the manufacture of food should be deemed a '*colouring food*' or a food additive. To establish criteria for classifying food extracts as colourings (*i.e.*, food additives) or foods with colouring properties (*i.e.*, colouring foods), in November 2013, the then EU's Standing Committee on the Food Chain and Animal Health (Section Toxicological Safety of the Food Chain), endorsed the *Guidance Notes on the classification of food extracts with colouring properties* (hereinafter, Guidance Notes). The Guidance Notes' purpose is to provide a working tool for business operators and enforcement authorities of EU Member States when considering if a substance is a colour or a '*colouring food*'. The Guidance Notes must be read in conjunction with the applicable legislation, especially *Regulation (EC) No. 1333/2008*, which constitutes the legal basis for the placing on the market and use of food additives, including colours, in the EU. The Guidance Notes describe the criteria that determine the difference between selective and non-selective extraction (especially the so-called '*enrichment factor*'). The term '*extract*' used in the Guidance Notes refers to preparations obtained from a food obtained by physical and/or chemical extraction, no matter whether they are labelled as extracts or concentrates (*i.e.*, it includes concentrates of extracts), used to colour foods (*i.e.*, water soluble and oil soluble extracts) (see *Trade Perspectives, Issue No. 20 of 31 October 2014*). The Guidance Notes are currently being reviewed by the Commission services and changes can be expected.

The judgment of the Freiburg Administrative Court is now final and binding. The Court had permitted an appeal, but the Land of Baden-Württemberg did not lodge one. The forthcoming issuance of the revised Guidance Notes by the European Commission should be carefully monitored and the matter of '*colouring foods*' and the appropriate labelling of products should be carefully addressed by food business stakeholders with their legal advisors.

## Recently Adopted EU Legislation

### Market Access

- [\*Summary of European Commission Decisions on authorisations for the placing on the market for the use and/or for use of substances listed in 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 \(REACH\) \(Published pursuant to Article 64\(9\) of Regulation \(EC\) No 1907/2006\)\*](#)
- [\*Summary of European Union decisions on marketing authorisations in respect of medicinal products from 1 February 2020 to 29 February 2020\(Published pursuant to Article 13 or Article 38 of Regulation \(EC\) No 726/2004 of the European Parliament and of the Council\)\*](#)



## Customs Law

- *Commission Recommendation (EU) 2020/403 of 13 March 2020 on conformity assessment and market surveillance procedures within the context of the COVID-19 threat*
- *Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation*
- *Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services 2020/C 86 I/01*
- *Commission Implementing Regulation (EU) 2020/426 of 19 March 2020 amending Implementing Regulation (EU) 2020/402 making the exportation of certain products subject to the production of an export authorisation*
- *Commission Implementing Decision (EU) 2020/414 of 19 March 2020 amending Implementing Decision (EU) 2019/570 as regards medical stockpiling rescEU capacities (notified under document C(2020) 1827) (Text with EEA relevance)*
- *Communication from the Commission Guidance note to Member States related to Commission Implementing Regulation (EU) 2020/402 making the exportation of certain products subject to the production of an export authorisation, as last amended by Commission Implementing Regulation (EU) 2020/426 2020/C 91 I/02*
- *Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services 2020/C 96 I/01*

## Food and Agricultural Law

- *Commission Delegated Regulation (EU) 2020/448 of 17 December 2019 amending Delegated Regulation (EU) 2016/2251 as regards the specification of the treatment of OTC derivatives in connection with certain simple, transparent and standardised securitisations for hedging purposes*
- *Commission Implementing Regulation (EU) 2020/443 of 25 March 2020 authorising the change of the specifications of the novel food spermidine-rich wheat germ extract (*Triticum aestivum*) under Regulation (EU) 2015/2283 of the European Parliament and of the Council and amending Commission Implementing Regulation (EU) 2017/2470*

## Other

- *Decision No 1/2020 of the EPA Committee of 14 January 2020 amending certain provisions of Protocol 1 concerning the definition of the concept of 'originating products' and methods of administrative cooperation to the Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part [2020/425]*

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