FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 12 of 13 June 2014

The EU Commission reportedly revises its draft implementing measures under the EU's Fuel Quality Directive

Informed sources have recently indicated that the EU Commission has revised key aspects of the draft measures implementing certain provisions of the EU's Fuel Quality Directive (*i.e.*, *Directive 1998/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels* as amended by *Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 as regards the specifications of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions*). In particular, it appears that the new draft envisages a methodology for the calculation of life-cycle greenhouse gas (hereinafter, GHG) emissions from fossil fuels that is different from earlier proposals.

The EU's Fuel Quality Directive lays down technical specifications on the quality of fuels used for road vehicles and non-road mobile machinery, as well as a target for the reduction of life-cycle GHG emissions from such fuels. In relevant part, EU Member States must require their fuel suppliers to reduce by 6% the GHG intensity of transportation fuels by 2020. This target, framed within the wider aim of triggering a transition from fossil fuels to energy from renewable sources in the EU's transportation sector, requires a calculation of the life-cycle GHG intensity of fossil fuels, on the basis of default values attributed to each fuel. Article 7(a) of the Fuel Quality Directive mandates that the necessary measures be adopted to implement, *inter alia*, the methodology for the calculation of the life-cycle GHG emissions of fossil fuels.

These implementing measures, which are long overdue, are still in the process of being adopted, after in 2012 the EU's expert committee failed to deliver a qualified majority to either outright pass or defeat a previous draft from the EU Commission (see Trade Perspectives, Issue No. 5 of 9 March 2012). This proposal proved particularly controversial, mainly because it attributed different default values to '*conventional fuels*' (*i.e.*, fuel from crude oil) and '*unconventional fuels*' (including fuel obtained from tar sands and shale oil). Notably, the EU Commission proposed that fuel from tar sands (or '*natural bitumen*', as referred to in the proposed draft) be attributed a GHG default value of 107 grams of CO2 per megajoule, a significantly higher value than the 87.5 grams of CO2 per megajoule ascribed to fuel from conventional crude.

According to the EU Commission, such methodology and values were in line with the findings of studies suggesting that fuels derived from tar sands produce remarkably higher life-cycle GHG emissions than conventional fuels. However, concerns were raised that the methodology in the draft implementing measures discriminated against fuels obtained from tar sands *vis-à-vis* other fossil fuels, although their environmental impact is allegedly comparable. In particular, Canada, which is the major producer of tar sands, expressed concerns that the draft measure translated in discriminatory treatment of its fuels in the EU's market, as compared to fuels sourced from other countries such as Mexico, Nigeria and Venezuela, for which no separate default value had been proposed (see Trade Perspectives, Issue No. 10 of 17 May 2013).

Following the deadlocked vote at the EU's expert committee, a new study to assess the impact of the proposal was commissioned. This study, which was completed in August 2013 but remains unpublished, has reportedly served as a basis for the EU Commission's revised draft measures. Reportedly, the revised draft retains the 107 grams of CO2 per megajoule as a default value for fuel from tar sands, while envisaging a value of 93.2 grams of CO2 per megajoule for fuel from conventional crude. The key novelty appears to stem from the fact that the new draft would no longer require fuel suppliers to disclose the life-cycle GHG intensity of the fuel (including the carbon footprint of the feedstock used) but, rather, would appear to envisage average GHG emission values directly for fuels, regardless of the raw material they have been obtained from. However, it appears that the draft maintains the requirement to report GHG emissions on the basis of the fuel's feedstock, as well as a review of the average values by 2016.

Arguably, the revised methodology is less likely to trigger a potential WTO scrutiny of the implementing measures, an option that Canada hinted it might explore if the initial draft were to be finally adopted. Indeed, the initial draft may have been found to discriminate against fuels from Canada *vis-à-vis* '*like*' fuels originating from the EU and from other countries, in violation of Articles I and III:4 of the WTO General Agreement on Tariffs and Trade. In addition, the initial proposal may also have been found to contravene the non-discrimination obligations under Article 2.1 of the WTO Agreement on Technical Barriers to Trade. A WTO Member challenging the implementing measures would need to show that any regulatory distinction between fuel obtained from tar sands and fuel from conventional crude is made on the basis of a process and production method (*i.e.*, the environmental impact produced during each fuel's production) that does not affect, *inter alia*, the product's physical characteristics and, therefore, that does not prevent the two types of fuel from being '*like*'. If, as reported, this distinction has been eliminated in the revised draft, potential complainants appear to have less grounds to trigger WTO dispute settlement proceedings.

The revision of the draft implementing measures, if confirmed, arguably responds to a number of factors, including internal pressures within the EU Commission between the EU environmental, energy and trade portfolios. It may also be assumed that the ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations with the US (where a large number of tar sands refineries are located) and the forthcoming finalisation of technical discussions on the Comprehensive Economic and Trade Agreement (CETA) with Canada encouraged the EU Commission to prioritise the EU's trade agenda. Furthermore, it may be speculated that other factors, such as Europe's energy security and the increasing unreliability of Russia as an energy trading partner, were also involved. In any event, it is undeniable that the effective, intense and targeted lobbying efforts from the Canadian Government and concerned industry sectors to the EU appear to have successfully delivered. This is also a lesson that other sectors, particularly in the biofuels industry (*i.e.*, palm oil, soybean, etc.), and EU trading partners (*i.e.*, Argentina, Indonesia, Malaysia, etc.), which stand to be similarly affected, if not discriminated, by the EU's Fuel Quality Directive, Renewable Energy Directive and Indirect Land Use Change (*i.e.*, ILUC) schemes, should

treasure and apply to their interactions with the EU for purposes of ensuring that the EU's adopted policies do not require long and costly WTO dispute settlement procedures.

Health warning and '*plain packaging*' regulations may soon target soda drinks and other sugary products in some countries

Recent reports indicate that health warning and '*plain packaging*' regulations, currently implemented or proposed in some countries in regards to tobacco products, may soon be extended to soda drinks and other sugary products. With numerous WTO disputes still pending regarding '*plain packaging*' on tobacco products, proposals to extend these types of regulations may be premature, if not highly ill-advised.

The use of health warnings on tobacco products has increased throughout the years, with varying results. For the last 50 years, countries have implemented regulations requiring certain phrases to be present on cigarette packaging to warn consumers of their health effects. In 2000, Canada became the first country to require full-colour graphic warning labels on tobacco products. In 2011, Australia became the first country to adopt '*plain packaging*' requirements on tobacco products (for developments leadings up to the adoption of Australia's regulations, see Trade Perspectives, Issues No. 19 of 22 October 2010 and 12 of 17 June 2011). The term '*plain packaging*' refers to generic packaging requirements that remove branding (*e.g.*, trademarks, associative colours, etc.) from product packaging in an attempt to remove the attractiveness of certain products deemed by the government to be hazardous. Indeed, insofar as tobacco products are concerned, '*plain packaging*' requirements generally come as a progression from graphic health warnings. Other countries or economic communities that reportedly have considered, or are currently considering, '*plain packaging*' regulations include Canada, the EU, France, India, Ireland, New Zealand, Norway, Turkey and the UK. The evidence regarding the effectiveness of health warnings and '*plain packaging*' requirements is mixed, including a report that the use of these types of measures actually increases the consumption of the targeted products.

Since Australia adopted its '*plain packaging*' regulations (*i.e.*, the *Tobacco Plain Packaging Act 2011*, implemented under the *Tobacco Plain Packaging Regulations 2011*, and the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011*), five WTO Members have initiated disputes against Australia before the WTO Dispute Settlement Body (hereinafter, DSB). On 13 March 2012, Ukraine filed a request for WTO consultations with Australia, with subsequent disputes having been filed by Honduras, the Dominican Republic, Cuba and Indonesia. In their requests for consultations, the complainants claim that Australia's measures are inconsistent with various articles in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, TRIPs Agreement), the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement) and the General Agreement on Tariffs and Trade. With respect to the TRIPs Agreement, the complainants assert, in part, that their goods are prevented or encumbered from enjoying the rights conferred by their trademarks in violation of, *inter alia*, Articles 16.1, 16.3 and 20 of the Agreement. Additionally, the complainants argue that Australia is violating Article 2.2 of the TBT Agreement by creating unnecessary obstacles to trade that are more trade-restrictive than necessary to fulfil a legitimate objective. In 4 April 2014, it was agreed that the same persons serve as panellists in all five disputes and that the timetables of the panel proceedings be harmonised.

Though regulations regarding food have yet to progress to the level of '*plain packaging*' requirements, there has been increased consideration or adoption of warning labels on food products, most recently in the area of sugary products. In the US, California is currently considering a law that would require all sugary beverage products to include a warning label stating "*Drinking beverages with added sugars contributes to obesity, diabetes and tooth*

decay". Recent reports from the UK and New Zealand indicate that similar warnings may be considered in those countries as well. Proponents of health warning labels on food argue that these types of actions are necessary to address increasing rates of obesity among their populations. However, opponents of warning labels on sugary products counter that these types of paternal government regulations are not appropriate and that there is evidence showing warning labels not being effective and that they unnecessarily create negative economic and trade effects.

This is an issue that needs to be monitored closely by food and beverage manufacturers. In particular, interested parties should follow the WTO '*plain packaging*' disputes closely, as they will likely be a determining factor as to whether '*plain packaging*' regulations are extended to sugary products in the future. Food and beverage manufactures should also remain vigilant as some of these measures and labelling/packaging schemes can be used, intentionally or unintentionally, to discriminate in favour of products from certain origins or of certain producers. This is a profile or '*side effect*' of such policies that should be systematically exposed and fought before the competent authorities and *fora*.

How the new EU Directive establishing that pollen is a natural constituent and not an ingredient of honey may have consequences for '*GM-free*' claims

On 15 May 2014, the EU Parliament and the Council adopted *Directive 2014/63/EU amending Council Directive 2001/110/EC relating to honey* (hereinafter, Directive 2014/63/EU). The main objective of Directive 2014/63/EU is to establish that pollen, being a natural constituent particular to honey, should not be considered to be an ingredient of honey. The content of Directive 2014/63/EU might have consequences for the currently popular '*GM-free*' claims.

Council Directive 2001/110/EC relating to honey (hereinafter, Directive 2001/110/EC) defines honey as the natural sweet substance produced by *Apis mellifera* bees (hereinafter, '*bees*'). Honey consists essentially of different sugars, predominantly fructose and glucose, as well as other substances such as organic acids, enzymes and solid particles derived from honey collection. Directive 2001/110/EC limits human intervention that could alter the composition of honey and thereby allows for the preservation of the natural character of honey. In particular, Directive 2001/110/EC prohibits the addition of any food ingredient to honey, including food additives, and any other addition other than honey. Similarly, that Directive prohibits the removal of any constituent particular to honey, including pollen, unless such removal is unavoidable in the removal of foreign matter. Directive 2014/63/EU states that the requirements of Directive 2001/110/EC are in line with the *Codex Alimentarius* standard for honey (*i.e.*, Codex Stan 12-1981).

Directive 2014/63/EU adds the following point in Article 2 of Directive 2001/110/EC: '*5. Pollen, being a natural constituent particular to honey, shall not be considered to be an ingredient, within the meaning of point (f) of Article 2(2) of Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers* (hereinafter, the FIR)*, of the products defined in Annex I to this Directive*'. The FIR defines '*ingredient*' as any substance used in the manufacture or preparation of a food and still present in the finished product, even in altered form. In the recitals to Directive 2014/63/EU, it is argued that the definition of '*ingredient*' implies a deliberate use of a substance in the manufacture or preparation of food. Taking into account the natural character of honey and, in particular, the natural origin of the presence of constituents particular to honey, pollen (being a natural constituent particular to honey) should not be considered to be an '*ingredient*' of honey within the meaning of the FIR.

Pollen is part of the composition criteria for honey set out in Directive 2001/110/EC. In the recitals to Directive 2014/63/EU, it is argued that available evidence, including empiric and scientific data, confirms that bees are the origin of the presence of pollen in honey. Pollen grains fall into nectar, which is collected by bees. In the hive, collected nectar containing pollen grains is transformed into honey by bees. Furthermore, according to the available data, additional pollen in honey can come from pollen on bees' hair, from pollen in the air inside the hive, and from pollen that was packed in cells by bees and released as a result of the accidental opening of those cells during the extraction of honey by food business operators. Pollen can, therefore, be said to enter the hive as a result of the activity of bees and is naturally present in honey regardless of whether or not food business operators extract that honey. Finally, Directive 2014/63/EU states that the deliberate addition of pollen to honey by food business operators is prohibited under Directive 2001/110/EC. On the other hand, it has been often argued that pollen enters into honey mainly by the centrifugation process carried out by beekeepers.

Directive 2014/63/EU states that it applies, without prejudice to the application of *Regulation (EC) No. 1829/2003 of the European Parliament and of the Council on genetically modified food and feed* (hereinafter, Regulation (EC) No. 1829/2003), to honey containing genetically modified (hereinafter, GM) pollen, since such honey constitutes food produced from genetically modified organisms (hereinafter, GMO) within the meaning of that Regulation. In Case C-442/09 (reference for a preliminary ruling from the *Bayerischer Verwaltungsgerichtshof* (Germany) – *Karl Heinz Bablok and Others v. Freistaat Bayern*), the Court of Justice of the EU ruled that the determining criterion for the application of Regulation (EC) No. 1829/2003, as set out in recital 16 of that Regulation, is whether material derived from the GM source material is present in food. Honey containing GM pollen should, therefore, be regarded as being '*food (partially) produced from a GMO*' within the meaning of point (c) of Article 3(1) of Regulation (EC) No. 1829/2003. Directive 2014/63/EU further states that laying down a provision, to the effect that pollen is not an ingredient of honey, does not therefore affect the Court's conclusion in Case C-442/09 that honey containing genetically modified pollen is subject to Regulation (EC) No. 1829/2003, in particular to the requirements thereof concerning authorisation prior to placing on the market, supervision and, where applicable, labelling.

The judgment of the Court of Justice in Case C-442/09 was interpreted as meaning that honey containing traces of pollen from GM plants must receive prior authorisation before it may be marketed as food in the EU. The labelling rules on GMO in food were also considered applicable. According to Regulation (EC) No. 1829/2003, the presence of material containing, consisting of, or produced from authorised GMOs in food must be labelled, except where that presence does not exceed 0,9% of each ingredient (according to Case C-442/09, including pollen). It appears that Directive 2014/63/EU tries somehow to '*circumvent*' the findings in the judgment of the Court of Justice in Case C-442/09, which has caused some stirs in the EU Commission due to the possibility of the presence of GM pollen in honey which, if pollen is considered an ingredient of honey (and exceeding 0.9% of total pollen), would need to be labelled as '*produced (partially) from a GMO*'. Such GM pollen would also need an authorisation.

Under the labelling requirements of Regulation (EC) No. 1829/2003, there is no obligation to indicate the presence of GM material in honey on labels for honey, if the following conditions are met: 1) such material does not exceed 0.9% of each ingredient; and 2) its presence in the honey is adventitious or technically unavoidable. Here is where the distinction of pollen as an ingredient or a natural constituent of honey becomes important. Were pollen to be deemed an ingredient of honey, the 0.9% threshold would apply to the total pollen and not the total honey. If this threshold were to be exceeded, there would be an obligation under Regulation (EC) No. 1829/2003 to indicate the presence of GM pollen in honey on the label. The result of defining pollen as a natural constituent of honey, as done in Directive

2014/63/EU, is that GM pollen will probably never reach the 0.9% threshold of total honey and does not need to be labelled nor authorised.

Directive 2014/63/EU will also have an impact on the '*GM-free*' claims on honey. Requirements for voluntary '*GM-free*' claims have not been established at EU level. However, some EU Member States, including France and Germany, have legislated on '*GM-free*' claims and developed labelling schemes. On 30 January 2012, France adopted *Decree no. 2012-128 concerning the voluntary labelling of foodstuffs originating from production chains qualified as 'GM-free'* under which ingredients from apiculture may be labelled as '*GM-free within a 3 km range*' provided that they originate from hives placed where nectar and pollen sources, as well as any complementary food for bees, located within a 3 km range, are GMO-free; and are not covered by Regulation (EC) No. 1829/2003. The German *Law implementing regulations of the European Community or the EU in the field of genetic engineering and on the labelling of food produced without the use of genetic engineering techniques* establishes that no food and food ingredients, which fall within the scope of Regulation (EC) No. 1829/2003, may be awarded a '*GM-free*' claim, unless foods containing material contains, consists of, or is produced from GMOs in a proportion no higher than 0.9% of the food ingredients considered individually or food consisting of a single ingredient and provided that this presence is adventitious or technically unavoidable. In conclusion, it appears that under both of these two EU Member States' frameworks, honey containing no more than 0.9% of GM pollen as a natural constituent of honey (and not 0.9% of GM pollen as an ingredient of honey) could even be labelled as '*GM-free*'.

It remains to be seen whether Directive 2014/63/EU will be challenged at the Court of Justice on grounds of '*circumventing*' the findings in case C-442/09. A second issue is whether '*GM-free*' claims on honey containing up to 0.9% GM pollen of total honey might mislead consumers. The latter is a marketing and labelling development that is increasingly taking hold in the industry, but which appears to suffer from a relative lack of proper and harmonised regulation at EU level. Given its ability to either confuse (if not intentionally deceive) consumers and distort the conditions of competition among economic operators, it appears necessary and urgent for EU authorities to fill this regulatory gap.

Recently Adopted EU Legislation

Customs Law

- *Regulation (EU) No. 599/2014 of the European Parliament and of the Council of 16 April 2014 amending Council Regulation (EC) No. 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items*

Food and Agricultural Law

- *Commission Regulation (EU) No. 601/2014 of 4 June 2014 amending Annex II to Regulation (EC) No. 1333/2008 of the European Parliament and of the Council as regards the food categories of meat and the use of certain food additives in meat preparations*

- *Directive 2014/63/EU of the European Parliament and of the Council of 15 May 2014 amending Council Directive 2001/110/EC relating to honey*

- *Commission Delegated Regulation (EU) No. 612/2014 of 11 March 2014 supplementing Regulation (EU) No. 1308/2013 of the European Parliament and of the Council by amending Commission Regulation (EC) No. 555/2008 as regards new measures under the national support programmes in the wine sector*

- *Commission Delegated Regulation (EU) No. 611/2014 of 11 March 2014 supplementing Regulation (EU) No. 1308/2013 of the European Parliament and of the Council as regards the support programmes for the olive-oil and table-olives sector*

Other

- *Decision No 585/2014/EU of the European Parliament and of the Council of 15 May 2014 on the deployment of the interoperable EU-wide eCall service*

Ignacio Carreño, Eugenia Laurenza, Anna Martelloni, Blanca Salas, Bruno G. Simões and Paolo R. Vergano contributed to this issue.