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Season's Greetings

2017 is drawing to a close and all of us in the International Trade and Food Law Group of *FratiniVergano* would like to wish you, your colleagues and families all the best for a peaceful holiday season and for a successful and healthy 2018. We hope that you have enjoyed *Trade Perspectives*© throughout this year and that you have always found it stimulating and timely. As usual, we have published a total of 23 issues and invested a great deal of time and energy in this undertaking. We have done it with the usual passion and drive.

You can find all previous issues of *Trade Perspectives*© on our website: http://www.fratinivergano.eu/en/trade-perspectives/.

For the year to come, we will continue with our editorial efforts, beginning with the publication of the next issue of *Trade Perspectives*© on 12 January 2018. *Trade Perspectives*© is now circulated to over 5,000 recipients worldwide and not a single week goes by without new readers asking to be added to our circulation list. This fills us with pride, but also with a deep sense of commitment and discipline towards our readers' expectations. Thank you for your interest in our publication and for helping us to make it a better and more useful tool of discussion. We look forward to continue hearing from you regularly and to another year of exciting international trade and food law developments, despite the rather gloomy outlook for international economic cooperation and the multilateral trading system.

The EU and Japan conclude their negotiations for a Free Trade Agreement

On 8 December 2017, the European Commissioner for Trade Cecilia Malmström and the Japanese Foreign Minister Taro Kono announced the successful conclusion of the final discussions on the EU-Japan Economic Partnership Agreement (hereinafter, EPA), with the EU publishing most texts of the agreed components of the EPA. The EPA provides for significant tariff reductions on products such as meat, wine, dairy and automobiles. Even more importantly, a number of longstanding non-tariff measures (hereinafter, NTMs) and non-tariff barriers (hereinafter, NTBs) were addressed and resolved during the negotiations. The EPA also includes a Chapter on '*Good Regulatory Practices and Regulatory Cooperation*', which includes the promotion of regulatory compatibility and that is key to continuously address NTMs/NTBs and to avoid the occurrence of new trade irritants between both Parties.

On 25 March 2013, the EU and Japan had officially launched their negotiations for a free trade agreement (hereinafter, FTA), now called the EU-Japan EPA. For a considerable period of time, negotiations proceeded without significant progress. Back in 2016, the outcome of the various negotiation rounds demonstrated slow progress and various obstacles remained, mainly in the areas of agriculture, market access and NTMs (see *Trade Perspective*, Issue No. 10 of 20 May 2016). During the negotiations, the reduction of outstanding tariffs in key sectors and the elimination of NTMs were the central issues. Although tariffs on goods are already generally low, some higher tariff rates persist in economically important sectors. More specifically, Japan still subjects certain goods to high tariffs that are important for EU exporters, namely in the agricultural and processed foods sectors. At the same time, the EU was expected to lower its tariffs in certain manufacturing sectors (*i.e*., motor vehicles, electronics and machinery), that are central to the interests of Japanese exporters. On 17 February 2017, the European Commission (hereinafter, Commission) and the Government of Japan announced their '*commitment for an earlier conclusion*' of the bilateral trade negotiations by the end of 2017 and, on 6 July 2017, leaders of the EU and Japan gave their political agreement on the main elements of the EU-Japan EPA, achieving a so-called '*Agreement in Principle*' (see *Trade Perspective*, Issue No. 14 of 14 July 2017).

As regards tariffs, Japan has agreed to liberalise 91% of imports from the EU at the entry into force of the agreement, reaching 99% liberalisation at the end of the staging period of 15 years. The remaining 1% will be partly liberalised through quotas and tariff reductions. As for tariff lines, Japan will liberalise 86% of its tariff lines at the entry into force of the agreement, going up to 97% after 15 years. In total, around 85% of tariff lines concerning EU agro-food products exported to Japan will be allowed to enter duty-free over time, corresponding to 87% of the current export value for agricultural products. For the EU, as the '*Agreement in Principle*' notes, the overall level of liberalisation is set at 99% with 96% of its tariff lines eliminated at the entry into force. In terms of imports, the EU's liberalisation is equivalent to 75% at the entry into force, but rising over 15 years to close to 100%. In particular, EU tariffs on automobiles will be fully liberalised within seven years and liberalisation for car parts will vary in time from entry into force to up to seven years. Already noted in the '*Agreement in Principle*' was the full exclusion from liberalisation of rice and seaweeds by both Parties. In the pig meat sector, Japan will maintain its import requirements, but will reduce the tariffs considerably. Tariffs for shoes will be reduced from 30% to 21% at the entry into force of the agreement and will be eliminated over ten years. For fish products, tariffs on blue fin tuna will be eliminated over a period of five years after the agreement has entered into force. For the EU, the EPA will eliminate Japanese duties of 30% on EU cheeses, as well as of 15% on wines. The EU will also be able to increase its beef and pork exports to Japan. In particular, the EU will be able to export processed pork meat duty free and fresh pork meat almost duty free. The EPA also ensures the protection of more than 200 high-quality European agricultural products, protected by Geographical indications (hereinafter, GIs) in Japan, while at the same time guaranteeing the protection of Japanese GIs within the EU. The EPA also opens up the respective services markets, particularly the financial, e-commerce, telecommunications and transport services sectors.

With respect to NTMs, substantive progress was achieved throughout the EPA negotiations, including in the important sectors of motor vehicles and food additives. The EU automotive sector, supported by the governments of France, Germany and Italy, had originally opposed the EU-Japan EPA, particularly after the entry into force of the EU-Korea FTA, which had led to increased importation of Korean cars into the EU, severely affecting some EU manufacturers (see *Trade Perspectives*, Issue No. 18 of 5 October 2012). Reportedly, discussions were held about sector-specific '*parallelism*' between tariffs and NTMs (*e.g*., the phasing out of the EU's 10% duty on cars from Japan in return for the Japanese pledge to remove certain NTMs (see *Trade Perspectives*, Issue No. 10 of 20 May 2016). One solution, proposed to mitigate the possible future negative effects of the FTA, was the introduction of an effective safeguard mechanism, which had already been included in the EU-Korea FTA. The EPA includes an Annex on motor vehicles, which was developed in close consultation

with industry associations and which covers a very substantial part of the United Nations Economic Commission for Europe Regulations (hereinafter, UNECE). The Annex on motor vehicles, together with addressing NTMs during the negotiations, should lead to the removal of all regulatory barriers for EU motor vehicle producers to access the Japanese market. Furthermore, the Annex contains a safeguard clause that, according to the '*Agreement in Principle*', will allow the EU to reintroduce tariffs in case Japan ceases to apply UNECE Regulations, reintroduces previously removed NTMs, or develops new ones. In particular, the safeguard clause will, once triggered, allow to '*snap-back*' tariffs on the affected products quasi automatically. Another important feature of the Annex is the cooperation clause, which aims at ensuring joint work in international standards-setting *fora*. The text of the Annex has not yet been published.

Another key aspect of the negotiations was Japan's regulation of food additives, which is currently much stricter than existing guidelines of the United Nations Food and Agriculture Organization. The EPA will include an Annex on food additives. In this Annex, the Parties are '*encouraged*' to provide relevant guidelines in English. Also, "*[u]pon request by a Party, the other Party will consider translating a specific guideline in English where possible*". The EU food industry has, in principle, welcomed the introduction of the '*Annex on food additives*'. However, the food industry in some EU Members States has reportedly criticised the Annex for containing '*too soft*' language. Currently, the majority of laws or regulations in Japan are only available in the Japanese language, which is a major trade barrier and a significant disadvantage for EU traders. Only "*encouraging*" the Parties to provide relevant rules in English might not lead to the desired degree of trade facilitation.

Finally, the issue of tariff classification of beer originating in the EU appears to have been resolved. A change in the beer definition, as part of Japan's tax reform, will allow beer originating in the EU to be exported, as early as from 2018, under the customs category of '*beer*' and no longer as '*alcoholic soft drink*', therefore being subject to the same taxation on the Japanese market as Japanese '*like*' products. The change of the definition of beer in Japanese law appears to be the result of parallel negotiations and of a decision by Japan to harmonise liquor taxes in the coming ten years.

Although many NTMs are being eliminated through the EPA or were resolved during the negotiations, certain administrative procedures and practices in Japan remain unresolved and might continue to place EU businesses at a disadvantage. An example is the testing of products to be imported into Japan, which can vary depending of the customs point of entry of the product. Hence, addressing NTMs will remain key to the success of the EU-Japan EPA, which is supposed to be facilitated by the Chapter on '*Good Regulatory Practices and Regulatory Cooperation*' (hereinafter, Chapter on Good Regulatory Practices and Cooperation). The Chapter on Good Regulatory Practices and Cooperation is similar to the one included in the EU-Canada Comprehensive Economic and Trade Agreement (CETA). It provides for enhanced cooperation between the Parties to promote common principles and guidelines, the mutual recognition of equivalence, and implementing tools to avoid unnecessary regulatory duplications. It also promotes cooperation between the Parties, and with third countries, in the relevant international *fora,* with a view to developing and promoting the adoption and implementation of international regulatory standards, including joint initiatives. Furthermore, the Chapter also provides for the establishment of a Committee on Regulatory Cooperation, which will promote good regulatory practices and regulatory cooperation between the Parties in order to reduce duplication and unnecessary procedures. This Committee will be co-chaired by representatives of both Parties.

The EU-Japan EPA is, so far, the most significant and far-reaching trade agreement ever concluded by the EU, in particular as it regards trade in the agro-food sector. There will be a significant reduction on tariffs, most of which will already be eliminated at the entry into force of the Agreement, while others will be phased out over a period spanning 15 years. At the same time, addressing the NTMs that negatively affect EU businesses has been a big success of the EPA negotiations. The EU and Japan will now begin the legal verification of

the text, the so-called process of '*legal scrubbing*'. Once this exercise is completed, the English text of the EPA will be translated into the other 23 official languages of the EU and into Japanese. After the translations are completed, the EPA will need to be ratified by the EU and Japan, in accordance with their respective ratification procedures. Once the ratification process has been completed, the EPA will enter into force. In the meantime, the EU and Japan will continue their negotiations on the issue of investment protection standards and investment dispute resolution. The absence of rules on investment protection from the EPA means that the final agreement, as it stands today, will likely be considered to be an agreement under the EU's exclusive competence. Therefore, the EPA will likely only be subject to ratification by the EU (*i.e.*, decisions of the European Parliament and the Council), without the necessity of ratification procedures in all EU Member States.

Considering the remaining necessary procedural steps, the EU-Japan EPA will likely only come into effect in 2019. Although the negotiations of the EPA have been concluded and a number of documents were immediately made public, some important information (*e.g.*, the detailed tariff schedules for goods and the annexes for key sectors) is still not available. Businesses, trade associations, non-governmental organisations and interested stakeholders, in the EU, in Japan and beyond, should carefully analyse the final text of the EPA, remain actively involved, and monitor any further developments.

Italy moves to support its agricultural producers through limiting rice imports into the EU and by extending country of origin labelling – a fine line between legitimate policies and protectionism

On 24 November 2017, Italy, joined by seven other EU Member States, requested the European Commission (hereinafter, Commission) to limit rice imports from Cambodia, which currently enter the EU market duty and quota free under the EU's Everything but Arms (hereinafter, EBA) preferential market access scheme. Shortly before, on 22 November 2017, the Italian Regional Administrative Court of Lazio (Rome) had rejected a request by the Italian Association of Confectionery and Pasta Industries to suspend the decree introducing mandatory country of origin labelling (hereinafter, COOL) for durum wheat in durum wheat pasta. These are just two key examples of Italy's current initiatives aimed at supporting its domestic farmers, but they remain delicate matters in light of EU legislation and world trade law rules.

Italy's first initiative, together with France, Greece, Hungary, Portugal, Romania, and Spain, targets rice imports from Cambodia into the EU. Cambodia is benefitting from preferential market access under the EU's EBA scheme. Article 1(c) of *Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences* (hereinafter, GSP Regulation) states that the regulation provides for tariff preferences under "*a special arrangement for the least-developed countries (Everything But Arms (EBA))*". Article 18 of the GSP Regulation provides that the "*Common Customs Tariff duties on all products that are listed in Chapters 1 to 97 of the Combined Nomenclature, except those in Chapter 93, originating in an EBA beneficiary country, shall be suspended entirely*". Rice is included in Chapter 10 of the Combined Nomenclature. The EU's EBA entered into force on 5 March 2001. With respect to rice, a transitional arrangement, limiting exports to the EU, remained in place until September 2009. After this, EBA beneficiary Cambodia began increasing its rice exports to the EU, in particular to Italy and France. Since 2012, overall imports from Cambodia to the EU significantly increased, leading to a substantial negative trade balance from the point of view of the EU. Rice exports from Cambodia to the EU increased twofold and Italy asserts that an increase of long-grain rice (*i.e.*, '*Indica*') imports from Cambodia, at a much lower price than the EU market price, has caused EU rice producers to switch to the production of short-grain rice (*i.e.*, '*Japonica*'). This switch has, in turn, allegedly led to overproduction in the EU and price decreases of up to 60%.

Article 22(1) of the GSP Regulation provides that, "*[w]here a product originating in a beneficiary country of any of the preferential arrangements referred to in Article 1(2), is imported in volumes and/or at prices which cause, or threaten to cause, serious difficulties to Union producers of like or directly competing products, normal Common Customs Tariff duties on that product may be reintroduced*". Article 23 of the GSP Regulation provides interpretative guidance on the term '*serious difficulties*' and Article 24(1) of the GSP Regulation further states that the "*Commission shall investigate whether the normal Common Customs Tariff duties should be reintroduced if there is sufficient prima facie evidence that the conditions of Article 22(1) are met*". Thus, the burden to introduce safeguards is considerably high. Still, Italy's Minister of Agriculture Maurizio Martina stated, on 24 November 2017, that he now expects the Commission to take a decision and, in a tweet, called the 2009 liberalisation "*erroneous*" and "*compromising the economy and social fabric*" of Italy.

It appears, however, that the Commission is already aware of the increased rice shipments originating in Cambodia and has started to take action. The Commission's October 2017 '*Rice Market*' update notes that, from 11-12 October 2017, a mission by the Commission's Directorates General of Trade and Agriculture to Cambodia "*[c]onveyed a clear message of limits to absorption capacity of EU rice market*". The update further notes that Cambodia was concerned of an EU safeguard and was "*now engaged in diversification, quality and capacity increase, and focus on fragrant rice*". Considering that, since 2006, the EU has not initiated any safeguard investigations or implemented any safeguards *vis-à-vis* EBA beneficiaries, it appears unlikely that this trend will now change with respect to rice from Cambodia. The recent mission to Cambodia does underline, however, that the Commission takes the issue seriously and continues to resort to soft measures to mitigate the situation. At the same time, Italy's recent introduction of COOL for rice can be seen as a sort of non-tariff approach to support and protect its rice industry.

Indeed, Italy has recently been introducing a number of measures establishing mandatory COOL for milk and milk used as an ingredient in certain milk products, durum wheat in durum wheat pasta, rice and, most recently, tomato products. On 22 November 2017, the Regional Administrative Court of Lazio (*i.e.*, the *Tribunale Amministrativo regionale del Lazio*) rejected a motion by the Italian Association of Confectionery and Pasta Industries (*i.e.*, the *Associazione delle Industrie del Dolce e della Pasta italiane*, and, hereinafter, Aidepi) to suspend Italy's decree on durum wheat in durum wheat flour pasta. On 17 August 2017, the Italian Official Journal had published the Italian Decree of 26 July 2017 (*Decreto 26 luglio 2017 - Indicazione dell'origine, in etichetta, del grano duro per paste di semola di grano duro*, hereinafter, the Decree) that requires mandatory COOL for durum wheat in pasta made from durum wheat flour (for the detailed labelling rules, see *Trade Perspectives*, Issue No. 16 of 8 September 2017). Mandatory COOL rules for single-ingredient food products, like durum wheat pasta, and for ingredients that represent more than 50% of a food have been debated in the EU, particularly in Italy, for a considerable time, already before the adoption of *Regulation (EU) No 1169/2011 on the provision of food information to consumers* (hereinafter, FIR) in 2011.

In October 2017, Aidepi announced that it had filed a motion with the Regional Administrative Court of Lazio to suspend the Decree. Aidepi's motion comes after it had originally submitted its own labelling proposal to the Italian Ministry of Agriculture, which was not reflected in the Decree. With respect to the mandatory COOL scheme for durum wheat in durum wheat flour pasta, Aidepi asserts that it did "*not correctly inform the consumer*" and risked making consumers "*believe that what counts for a quality pasta is the origin of the wheat*", which, according to Aidepi, was not true. Aidepi further notes that the COOL rules did not encourage Italian farmers to produce quality wheat, but only reduced their competitiveness abroad because it introduced an obligation that involves additional costs only for Italian farmers and not for competitors elsewhere outside of Italy. Aidepi went as far as describing the costs associated with mandatory COOL as an additional tax on Italian pasta producers. Finally,

Aidepi underlines that it was in favour of transparency towards the consumer, which had been the main intention of its own proposal.

The Regional Administrative Court of Lazio did not side with Aidepi and confirmed the Decree. The Administrative Court held that public interest aimed at protecting consumer information was prevalent, in particular considering the outcome of recent public surveys regarding the importance given by Italian consumers to the knowledge of the country of origin and/or place of provenance of foodstuffs and the primary ingredient. According to data gathered from the public online consultation on the transparency of information on the label of agro-food products, carried out on the website of the Ministry of Agricultural, Food and Forestry Policies, in which over 26,000 Italian citizens participated, over 85% of Italians consider it important to know the origin of primary ingredients especially for pasta. It is not clear, though, how representative this online survey might have been. Following the decision by the Regional Administrative Court, the Decree will likely enter into force, as foreseen in the Decree, on 17 February 2018, experimentally until 31 December 2020.

What the Administrative Court of Lazio did not do, however, was to submit the issue to the Court of Justice of the European Union (hereinafter, CJEU) for a preliminary ruling. Considering that EU legislation, more specifically the Food Information Regulation, provides the relevant rules, this was not only a matter of domestic Italian law and the judges at the Regional Administrative Court of Lazio might have been obliged to pause proceedings and submit the relevant questions related to EU law to the CJEU.

Indeed, the Decree does not appear to satisfy the legal requirements for mandatory COOL for food products, neither in terms of substance, nor in terms of the procedure. Firstly, in terms of the procedure, Article 39(1) of the FIR refers to the notification procedure provided for in Article 45 of the FIR. It provides that an EU "*Member State which deems it necessary to adopt new food information legislation shall notify in advance the Commission and the other Member States of the measures envisaged and give the reasons justifying them*". The second sentence of Article 39(2) of the FIR further adds to this obligation, requiring EU Member States, when notifying such measures to the Commission, to "*provide evidence that the majority of consumers attach significant value to the provision of that information*". Italy had notified, in December 2016, a draft decree on COOL for durum wheat in durum wheat flour pasta and rice (see *Trade Perspectives*, Issue No. 5 of 10 March 2017). On 12 May 2017, Italy notified a new draft decree on COOL for durum wheat in durum wheat flour pasta to the Commission. The draft was discussed at the June meeting of the Section '*General Food Law*' of the Standing Committee on Plants, Animals, Food and Feed (hereinafter, SCPAFF), composed of representatives from the Commission and the EU Member States and consulted in case of notifications under Article 45 of the FIR. Reportedly, 11 EU Member States "*strongly criticized*" the Italian draft. Italy then withdrew its notification and, without notifying it, went on to adopt a slightly amended decree on COOL for durum wheat in durum wheat flour pasta on 26 July 2017, published on 17 August 2017. It is apparent that Italy by-passed the procedures established in the FIR.

Secondly, the Italian Decree does not appear to satisfy the substantive requirements of Article 39(2) of the FIR. The first sentence of Article 39(2) of the FIR provides that "*[EU] Member States may introduce measures concerning the mandatory indication of the country of origin or place of provenance of foods only where there is a proven link between certain qualities of the food and its origin or provenance*". At the June meeting of the SCPAFF, the Italian authorities explained that the notified draft measure was based on consumers' interest and on the specific quality of the durum wheat of Italian origin used in pasta production. In addition, the beneficial effects of the measure for the Italian farmers were underlined. However, a clear proven link between the origin of the durum wheat and the quality of the pasta, as required by the FIR, does not appear to have been established by Italy. The arguments put forth by Aidepi further confirm this assessment.

In addition to EU legislation, it remains untested if the recent COOL measures in EU Member States can withstand the possible scrutiny of the World Trade Organization (hereinafter, WTO). So far, the measures have been critically discussed in the WTO's Committee on Technical Barriers to Trade (TBT), but no WTO Member has requested consultations with the EU, which would initiate dispute settlement proceedings. If prior WTO cases, in particular, *United States – Certain Country of Origin Labelling (COOL) Requirements*, can be relevant guidance, there are reasons to believe that, at least some of the EU Member States' COOL measures, including the Italian Decree on durum wheat in durum wheat flour pasta, would be incompatible with WTO rules with respect to the costs for the industry and the relatively minute additional information for consumers. In particular, allowing a label to provide '*EU or non-EU*', does not allow the consumer to effectively gain knowledge of the actual origin of the product and does not provide any useful information at all (see *Trade Perspectives*, Issue No. 1 of 13 January 2017). In December 2017, the trade association representing the European food and drink industry, FoodDrinkEurope (FDE), submitted an official complaint to the Commission concerning the various COOL measures introduced by Italy.

Any country has a legitimate interest to support and protect its farmers and industries through all available political and legal tools. At the same time, any country must be conscious of and act in respect of the relevant legal rules, at the domestic level, the EU level (if applicable), and at the international (WTO) level. The activation of the EBA safeguard mechanism has been put in place for this kind of situation and the request by Italy and the other EU Member States should be duly assessed. At the same time, while pursuing legitimate interests with its COOL initiatives, Italy should follow the relevant EU rules, in particular concerning the notification of intended measures to the EU and the WTO, if friction and trade irritants are to be avoided. Stakeholders and trading partners should carefully monitor these initiatives and developments and take the necessary actions to support or counter the initiatives.

The European Parliament does not veto the authorisation of phosphate additives in '*frozen vertical meat spits*', better known as '*kebab*' meat – Call for harmonised labelling of phosphates in take-away foods

On 13 December 2017, the plenary of the European Parliament (hereinafter, Parliament) rejected a resolution vetoing a European Commission (hereinafter, Commission) proposal for a regulation allowing the use of phosphate additives in '*frozen vertical meat spits*', a description of products being sold throughout the EU as '*kebab*' meat, be it mutton, lamb, veal, beef or poultry. The resolution was drafted by the Parliament's Public Health and Food Safety Committee and adopted on 28 November 2017 by 32 votes to 22. Needing an absolute majority of at least 376 in the Parliament's plenary, the resolution fell only three votes short (the vote was 373 in favour of the resolution, 272 against, with 30 abstentions). On 25 September 2017, the Commission's proposal already received the support of a majority of the EU Member States in the Standing Committee on Plants, Animals, Food and Feed. However, it had to go through a three-month scrutiny period, during which the Parliament was entitled to object to the text and veto it.

Under *Regulation (EC) No 1333/2008 of the European Parliament and of the Council on food additives*, phosphate additives are not allowed in '*meat preparations*', unless stated otherwise in Annex II, which establishes a number of exceptions. In '*meat products*', as well as in other foods (*inter alia*, UHT milk, unripen cheese, processed cheese, spreadable fats, edible ice, fruit and vegetable preparations, certain unprocessed fish, canned crustaceans products, surimi and similar products), phosphate additives are allowed. Article 6 of *Regulation (EC) No 1333/2008* states that a food additive may be included in the lists of exceptions in Annex II only if: 1) On the basis of the scientific evidence available, it does not pose a safety concern to the health of the consumer at the level of use proposed; 2) There is a reasonable technological need that cannot be achieved by other economically and

technologically practicable means; and 3) Its use does not mislead the consumer. The draft *Commission Regulation amending Annex II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council as regards the use of phosphoric acid, phosphates, di-, tri- and polyphosphates (E 338-452) in frozen vertical meat spits* intends to add yet another exception in the category of '*meat preparations*'.

Annex II to *Regulation (EC) No 1333/2008* lays down a list of food additives approved for use in food and their conditions of use. That list may be updated in accordance with the common procedure referred to in Article 3(1) of *Regulation (EC) No 1331/2008 of the European Parliament and of the Council of establishing a common authorisation procedure for food additives, food enzymes and food flavourings*, either on the initiative of the Commission or following an application by an EU Member State or by an interested party. On 28 August 2015, an industry application was submitted for the authorisation of the use of phosphoric acid, phosphates, di-, tri- and polyphosphates as stabilisers and humectants in '*frozen vertical meat spits*' falling under the food category of '*meat preparations*', as defined by *Regulation (EC) No 853/2004 laying down specific hygiene rules for on the hygiene of foodstuffs*. '*Meat preparations*' means "*fresh meat, including meat that has been reduced to fragments, which has had foodstuffs, seasonings or additives added to it or which has undergone processes insufficient to modify the internal muscle fibre structure of the meat and thus to eliminate the characteristics of fresh meat*". However, *Regulation (EC) No 853/2004* defines '*meat products*' as "*processed products resulting from the processing of meat or from the further processing of such processed products, so that the cut surface shows that the product no longer has the characteristics of fresh meat*".

According to the industry request, "*the use of phosphates is required for a partial extraction and breakdown of meat proteins to form a protein film on vertical meat spits to bond meat pieces together in order to ensure homogenous freezing and roasting*". Furthermore, phosphates ensure that the meat remains juicy during thawing and that vertical meat spits remain stable. In view of the application, the Commission acknowledged in the draft regulation such technological need for "*frozen vertical rotating meat spits made of sheep, lamb, veal or beef treated with liquid seasoning or from poultry meat treated with or without liquid seasoning used alone or combined as well as sliced or minced and designed to be roasted by a food business operator*".

Pursuant to Article 3(2) of *Regulation (EC) No 1331/2008*, the Commission has to seek the opinion of the European Food Safety Authority (hereinafter, EFSA) in order to update the EU list of food additives set out in Annex II to Regulation (EC) No 1333/2008, except where the update in question is not liable to have an effect on human health. Safety of phosphates was evaluated in 1991 by the EFSA's predecessor, the Scientific Committee for Food, which established the Maximum Tolerable Daily Intake of 70 mg/kg body weight expressed as phosphorus (P). Phosphates are authorised for use as food additives in a wide variety of foods, including meat products and certain meat preparations. Thus, the Commission argued that it did not expect that the extension of use to frozen vertical meat spits would have a significant impact on the overall exposure to phosphates. In order to limit further exposure to added phosphates, the extension of use should be restricted only to the frozen vertical meat spits, for which the technological need was identified. Since the extended use of those additives constitutes an update of the EU list, which is not liable to have an effect on human health, the Commission did not consider it necessary to seek EFSA's opinion.

In Part E of Annex II to *Regulation (EC) No 1333/2008*, in food category 08.2 '*Meat preparations as defined by Regulation (EC) No 853/2004*', the Commission intends to add to the current entry for "*E 338-452 Phosphoric acid, phosphates, di-, tri- and polyphosphates (maximum level 5,000 mg/kg): only breakfast sausages: in this product, the meat is minced in such a way so that the muscle and fat tissue are completely dispersed, so that fibre makes an emulsion with the fat, giving the product its typical appearance; Finnish grey salted Christmas ham, burger meat with a minimum vegetable and/or cereal content of 4% mixed within the meat, Kasseler, Bräte, Surfleisch, toorvorst, šašlõkk, ahjupraad, Bílá klobása,*

Vinná klobása, Sváteční klobása, Syrová klobása" the following: "*and frozen vertical rotating meat spits made of sheep, lamb, veal and/or beef treated with liquid seasoning or from poultry meat treated with or without liquid seasoning used alone and/or combined as well as sliced and/or minced and designed to be roasted by a food business operator and then consumed by the final consumer*".

The Parliament's draft resolution insisted that the use of phosphate additives was generally not permitted in meat preparations. However, by means of derogation after derogation, the use of phosphates as additives had been approved in more and more meat preparations. The Parliament noted that there were serious concerns and questions surrounding the negative health effects of phosphates used as food additives. In 2012, a scientific review was published, finding that phosphate additives in food were a matter of concern as they might be linked to elevated serum phosphate levels. High serum phosphate levels have been associated with increased cardiovascular risks. The Parliament further noted that the Commission requested that EFSA undertake a scientific evaluation of the concerns raised in the scientific review, which EFSA subsequently published in 2013. While EFSA concluded, in its assessment of the review, that it was not possible to ascertain whether the increased cardiovascular risk was attributable to differences in the dietary intake of phosphorus in general, or in the form of phosphate additives, it also highlighted that, as required under *Commission Regulation (EU) No 257/2010 setting up a programme for the re-evaluation of approved food additives in accordance with Regulation (EC) No 1333/2008*, phosphates for use as food additives would be re-evaluated by EFSA with high priority by 31 December 2018. In addition to health concerns, the Parliament noted that, in 2017, a Commission report on official controls of food additives and smoke flavourings found that, overall, EU Member States face significant challenges in verifying that food additives are used in accordance with EU legislative requirements. The report also stated that, within some EU Member States, competent authorities and food business operators had different, and sometimes incorrect, interpretations of applicable EU requirements relating to meat preparations and meat products, including when it came to the interpretation of exceptions listed in *Regulation (EC) No 1333/2008*, thereby resulting in a lack of uniform implementation of such requirements. Finally, the Parliament added that phosphates, owing to their water-binding properties, could be used to increase the weight of meat, thereby allowing food business operators to intentionally mislead consumers and commit fraud by selling water for the price of meat.

As the resolution was not adopted, the Parliament gives green light to the Commission to authorise the use of the phosphate additives for '*kebab*' meat. Like for any other additive allowed on the EU's Single Market, if a health concern were to arise, for example due to the outcome of the re-evaluation being undertaken by EFSA, the authorisation would have to be reconsidered. The adoption of the resolution would, however, not have resulted in a '*ban*' on '*kebab*' meat, as was claimed in particular by German and UK media, which would have allegedly led to the loss of thousands of jobs. The Parliament was not voting on a proposal to ban anything, but on whether or not to allow a certain type of food additive to be used.

Now that the Commission Regulation will move forward, the Director General of the European Consumer Organization (BEUC) has already called on EU Member States to require that "*kebab vendors clearly inform consumers on the presence of phosphates in their meat through labelling and check they do so*". Article 44 of the FIR establishes the information requirements that need to be given where foods are packed on the sales premises at the consumer's request or prepacked for direct sale. The FIR does not require the indication of whether phosphates have been added to such foods, or does *Regulation (EC) No 1333/2008.* There are, however, non-harmonised national measures for non-prepacked food.

In Germany, menus in restaurants and take-away food outlets indicate that sausages (*i.e.*, *Bratwürste*) contain phosphates. This is required by § 9(1)8) of the German Ordinance on the Authorisation of Additives to Foods for Technological Purposes (*Zusatzstoff-Zulassungsverordnung*, hereinafter, ZZulV), which establishes that a menu in the catering

sector must contain the words '*with phosphates*' when in the manufacture of meat products the additives E 338 to E 341, E 450 to E 452 were used. Such provision has not been established in EU law.

The EU rules on food additives are directly applicable in all EU Member States and take precedence over national rules. The provisions of the ZZulV are, therefore, largely superseded by EU law. However, the ZZulV remains applicable insofar as it is not overlapped by overriding EU law. This applies, *e.g.,* for the provisions informing consumers about food additives in the case of loosely offered foods. Does it mean that kebab where phosphates have been added have to be marked in Germany as '*with phiosphates*'? Arguably not. The requirement of § 9(1)8) of the ZZulV only applies to '*meat products*' where the additives E 338 to E 341, E 450 to E 452 were used and not to '*meat preparations*'. Interestingly enough, authorities in some EU Member States (including Germany) interpreted '*kebab*' as a '*meat product*', where the addition of phosphates was already authorised (or tolerated) by *Regulation (EC) No 1333/2008*. Following this interpretation, the indication of the addition of phosphates to '*kebab*' would have been already required on restaurant and take-away menus. However, now that the addition of phosphates to the '*meat preparation*' of '*frozen vertical meat spits*' will be authorised by amending Annex II to *Regulation (EC) No 1333/2008*, it is clear that '*kebab*' is a '*meat preparation*', not a '*meat product*'. Therefore, arguably it does not have to be marked (at least in Germany) '*with phosphates*'. The ultimate interpretation of EU law rests with EU Courts. In order to provide legal certainty for operators and to protect consumers, harmonised rules on the indication of phosphate additives to all meat dishes (where there is a technological need), which are ready for consumption by the final consumer, may be warranted.

Interested parties should closely monitor any developments on phosphate additives in order to ensure that their legitimate interests are duly taken into account and safeguarded. EFSA's upcoming re-evaluation of the safety of phosphate food additives, by 31 December 2018, and other initiatives in the EU on phosphate additives should be monitored. Stakeholders should be ready to contribute shaping potentially future EU legislation by interacting with the relevant EU Institutions, trade associations and affected stakeholders.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) 2017/2298 of 12 December 2017 amending Regulation (EC) No 669/2009 implementing Regulation (EC) No 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin*

Customs Law

- *Commission Implementing Regulation (EU) 2017/2310 of 13 December 2017 opening a tariff quota for the year 2018 for the import into the Union of certain goods originating in Norway resulting from the processing of agricultural products covered by Regulation (EU) No 510/2014 of the European Parliament and of the Council*

- *Commission Implementing Regulation (EU) 2017/2314 of 13 December 2017 fixing the allocation coefficient to be applied to the quantities covered by the applications for import licences lodged from 20 November 2017 to 30 November 2017 and determining the quantities to be added to the quantity fixed*

for the subperiod from 1 July 2018 to 31 December 2018 under the tariff quotas opened by Regulation (EC) No 2535/2001 in the milk and milk products sector

- *Commission Implementing Decision (EU) 2017/2277 of 8 December 2017 determining that a temporary suspension of the preferential customs duty pursuant to Article 15 of Regulation (EU) No 19/2013 of the European Parliament and of the Council is not appropriate for imports of bananas originating in Peru*

- *Commission Implementing Regulation (EU) 2017/2235 of 4 December 2017 derogating from Regulations (EC) No 2305/2003, (EC) No 969/2006 and (EC) No 1067/2008 and from Implementing Regulations (EU) 2015/2081 and (EU) 2017/2200, Regulation (EC) No 1964/2006 and Implementing Regulation (EU) No 480/2012 and Regulation (EC) No 1918/2006 as regards the dates for lodging import licence applications and issuing import licences in 2018 under tariff quotas for cereals, rice and olive oil*

Trade Remedies

- *Commission Implementing Regulation (EU) 2017/2300 of 12 December 2017 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Implementing Regulation (EU) 2015/82 on imports of citric acid originating in the People's Republic of China by imports of citric acid consigned from Cambodia, whether declared as originating in Cambodia or not, and making such imports subject to registration*

- *Commission Implementing Regulation (EU) 2017/2232 of 4 December 2017 reimposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam and produced by certain exporting producers in the People's Republic of China and Vietnam and implementing the judgment of the Court of Justice in Joined Cases C-659/13 and C-34/14*

Food and Agriculture Law

- *Council Decision (EU) 2017/2307 of 9 October 2017 on the conclusion of the Agreement between the European Union and the Republic of Chile on trade in organic products*

- *Agreement between the European Union and the Republic of Chile on trade in organic products*

- *Commission Implementing Regulation (EU) 2017/2309 of 13 December 2017 operating deductions from fishing quotas available for certain stocks in 2017 on account of overfishing of other stocks in the previous years and amending Implementing Regulation (EU) 2017/1345*

- *Commission Implementing Regulation (EU) 2017/2308 of 13 December 2017 concerning the authorisation of the preparation of Bacillus subtilis (DSM 5750) and Bacillus licheniformis (DSM 5749) as a feed additive for suckling piglets (holder of authorisation Chr. Hansen A/S)*

- *Commission Implementing Regulation (EU) 2017/2281 of 11 December 2017 authorising an increase of the limits for the enrichment of wine produced using the grapes harvested in 2017 in certain wine-growing regions of Germany and in all wine-growing regions of Denmark, the Netherlands and Sweden*

Other

- *Council Decision (EU) 2017/2242 of 30 November 2017 authorising the opening of negotiations to amend the International Sugar Agreement 1992*

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