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The EU and Indonesia launch negotiations of the Comprehensive Economic Partnership Agreement

On 20-21 September 2016, the EU and Indonesia kicked-off negotiations on the Comprehensive Economic Partnership Agreement (hereinafter, CEPA) in Brussels. Earlier this year, in April 2016, both Parties concluded their scoping exercise and announced that negotiations would begin soon (see *TradePerspectives*, Issue No. 9 of 6 May 2016). Recent positive developments with respect to timber trade, illegal fisheries and biodiesel exports have positioned Indonesia well going into these important trade talks.

Negotiations to upgrade trade relations between the Association of Southeast Asian Nations (hereinafter, ASEAN) and the EU have been ongoing, either between the EU and ASEAN as a whole, or between the EU and individual ASEAN Member States (hereinafter, AMSs), since 2006. In 2007, the EU and ASEAN initiated negotiations to conclude a '*region-to-region*' agreement, but in May 2009 the parties agreed to put the discussions on hold and the Council of the EU decided to pursue negotiations with individual AMSs. Negotiations with Singapore and Viet Nam were concluded in 2014 and 2015, respectively, negotiations were launched with the Philippines in December 2015, and negotiations with Malaysia and Thailand are technically ongoing, but *de facto* suspended. The strategic objective of a '*region-to-region*' agreement remains, insomuch as the individual agreements are to be concluded with a view to eventually use these bilateral instruments as '*building blocks*' for an EU-ASEAN FTA (see *Trade Perspectives*, Issue No. 9 of 4 May 2012).

On 1 May 2014, the Partnership and Cooperation Agreement (PCA) between the EU and Indonesia entered into force. The PCA provides a framework for regular political dialogue, sectoral cooperation and the overall improvement of bilateral relations. Currently, Indonesia benefits from trade preferences granted by the EU under its Generalised Scheme of Preferences (GSP), which provides preferential access for about 30% of total imports from Indonesia into the EU. In the light of negotiations with AMSs, negotiations with Indonesia have particular significance as Indonesia represents ASEAN's largest and most populated economy. In preparation of CEPA negotiations, the EU and Indonesia conducted preparatory discussions on a '*scoping paper*' for a future agreement. That process was concluded in April 2016. The expected timeframe for CEPA negotiations currently extents to 2019. Although the lowering or elimination of tariffs is an important aspect of preferential trade agreements, tackling specific trade irritants and dealing with sector-specific issues has become increasingly important in recent negotiations. For instance, the EU-Korea Free Trade Agreement includes 5 sector-specific annexes. Within the framework of the Transatlantic

Trade and Investment Partnership (TTIP), the US and the EU are currently negotiating at least 8 sector-specific parts of the future agreement, ranging from cosmetics to medical devices. Similarly, CEPA negotiations provide an opportunity for the EU and Indonesia to deal with the key issues affecting trade and investment. The EU consistently pursues various issues with respect to trade and sustainable development as an important aspect of its trade negotiations. However, recent developments show that Indonesia is already complying with several key EU legal frameworks (*e.g.*, IUU and FLEGT schemes), thereby giving the Southeast Asian country a position of strength in trade and sustainability and ensuring that the debate and concessions are fair and not one-sided.

With respect to timber trade, in 2003, the EU drew up an Action Plan on Forest Law Enforcement, Governance and Trade (hereinafter, FLEGT). The FLEGT Action Plan combats illegal logging by supporting sustainable and legal forest management. Additionally, it aims at promoting trade in legally produced timber. The EU has concluded Voluntary Partnership Agreements (hereinafter, VPAs) with a number of countries in Africa, Asia and Latin America. In March 2007, Indonesia was among the first countries with which the EU began negotiations for a VPA. In May 2014, the VPA entered into force, and in September 2016, Indonesia reached the final milestone. On 15 September 2016, Indonesia and the EU announced that Indonesia will be the EU's first trading partner to be allowed to issue FLEGT licences verifying legal timber products for its export to the EU. The VPA and the FLEGT licencing scheme are already important steps for Indonesia and CEPA negotiations now offer the chance to perpetuate and deepen EU-Indonesian cooperation in this sector, ideally linking these strong commitments to commercial benefits and preferential market access. In 2014, Indonesian timber industry produced about 67 million cubic metres of roundwood, which is mainly processed domestically. Still, the export of primary timber products accounts for a total export value of more than USD 2.5 billion in 2014, with plywood being the most important product and, to a lesser extent, also sawnwood. At the same time, Indonesia was ranked third largest tropical wood importer into the EU responsible for 10.7% of total tropical wood imports, preceded only by Cameroon (20.3%) and Malaysia (19.2%). Indonesia's main export destinations are currently Japan and China, but the FLEGT licencing and CEPA negotiations should open the door to significant improvements for trade with the EU.

Another key issue with respect to trade between the EU and Indonesia is the issue of fisheries and, in particular, illegal, unreported and unregulated (hereinafter, IUU) fishing. This issue is of particular importance due to the significant fisheries trade opportunities between the EU and Indonesia. Indonesia's fishery sector reached an export value of USD 4.64 billion. The EU is the largest seafood importer in the world, with fisheries imports reaching a value of EUR 21 billion in 2014. In that context, however, imports from Indonesia only accounted for up to EUR 348 million. Currently, the most important destination of Indonesian fishery products is the US, accounting for 41% of Indonesia's total fisheries exports in 2015, followed by Japan (16%), the EU (12%) and other ASEAN Member States (11%). Production, as well as export volume and value, have witnessed a steady increase, in particular due to Indonesia's efforts in combating IUU fishing. Only 3 years ago, it was still officially estimated that illegal fishing cost Indonesia over USD 3 billion per year. However, for years, Indonesia has been engaged in a dialogue with the EU with a view to improve fisheries control and achieve compliance with the EU's IUU legal framework. On 17 May 2016, the European Commission (hereinafter, Commission) announced that it had given the '*green light*' to Indonesia. Indonesia has reformed its domestic legal framework with respect to fisheries, implemented recommendations by Regional Fisheries Management Organisations (RFMOs), set up a National Data Sharing system and a task force against IUU fishing in line with a programme of increased enforcement. Additionally, on 23 June 2016, Indonesia ratified the UN Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. While Indonesia is now complying with the EU's IUU framework, a closer and continuous cooperation with the EU on all issues related to fisheries should result in greater market access for Indonesian seafood for years to come. As the Commission pointed out in its associated Communication in May, Indonesia could and should serve as an example for the entire region. CEPA negotiations provide a good opportunity to achieve this goal and to ensure that tangible commercial advantages reward the sustainability commitments made by Indonesia.

CEPA must also be the context in which meaningful steps are finally taken, by both parties, with respect to the sustainability criteria applied to vegetable oils, particularly palm oil. In this area, in fact, the EU appears to often mix its environmental agenda with trade protectionism. On 15 September 2016, in the context of palm oil and biofuels, the EU General Court delivered its decision annulling EU tariffs against Argentine and Indonesian biodiesel. In 2013, the Council of the EU had issued *Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia*. Biodiesel in Indonesia is almost exclusively produced from crude palm oil (hereinafter, CPO) and, after a complaint by the European Biodiesel Board, the Commission investigated the matter and concluded "*[…] that the imports of biodiesel produced in Indonesia […] were dumped*". However, the EU General Court found that it was "*not apparent from the file that the CPO price was directly regulated in Indonesia*" and that "*[…] it must be considered that the institutions failed to establish to the requisite legal standard that there was applicable distortion of the price of CPO in Indonesia […]*". Apart from the recurring anti-dumping proceedings, palm oil-based biofuel continues to have difficultly being recognised as '*renewable*' under EU law, and is not included in biofuel blending targets. Additionally, '*no palm oil*' labels are a growing phenomenon on food products, clearly violating the EU's Food Information Regulation (*i.e.*, *Regulation (EU) No. 1169/2011 on the provision of food information to consumers*) with '*self-evident*' or '*misleading*' statements. The EU and its Member States' authorities are turning a blind eye and allowing these anti-competitive and illegal practices to target palm oil as a whole. As acknowledged by both parties in the joint statement after the conclusion of the '*scoping paper*', the palm oil industry is significant to both economies. It is now time for the EU to recognise and incentivise the improved sustainability situation of the palm oil industry and to put an end to the discrimination caused by the EU's failure to act against unjustified barriers to trade. CEPA must offer such opportunity.

After these first negotiations and their general stocktaking of ambitions, both sides can now prepare their specific and more detailed negotiating approaches, develop templates and draw up key lines. Indonesian non-governmental organisations are already warning of a potential imbalance in the negotiations. Indeed, CEPA negotiations and future commitments must be reciprocal, take into account interests from both sides and aim at a balanced outcome. As the next meetings are reportedly only scheduled for early 2017, this will allow both parties and all interested stakeholders to further prepare the negotiations, exchange documents and positions, and set the stage for the upcoming rounds.

The WTO Appellate Body issues its Report in *India – Solar Cells*

On 16 September 2016, the WTO Appellate Body issued its Report in *India – Certain Measures Relating to Solar Cells and Solar Modules* (hereinafter, *India – Solar Cells*). In large part, the Report reiterates the Appellate Body's previous ruling in *Canada – Renewable Energy*, likely setting a firm position for future disputes, including a counter-dispute filed by India against the US concerning comparable measures in the renewable energy sector.

The formal initiation of the dispute by the US dates back to February 2013, when it filed a request for WTO consultations with India concerning domestic content requirements (hereinafter, DCRs) under "*Phase I*" of the Jawaharlal Nehru National Solar Mission (hereinafter, NSM) for solar cells and solar modules. In February 2014, the US "*supplemented*" its request for WTO consultations following the launch of "*Phase II*" of the NSM. In total, the NSM is a three-phase initiative by India to promote ecologically sustainable growth through the increased use of solar power electricity generation, while also addressing recent energy security issues afflicting India. Reports indicate that the energy security issues relate to energy shortages due, in large part, to India's reliance on coal-powered electricity. The first phase of the NSM lasted from 2012 to 2013 and focused on capturing the easiest to achieve solar-powered energy options, supporting off-grid rural populations and producing modest capacity additions in India's energy grid. "*Phase II*", which is to last until 2017, intends to aggressively scale-up solar energy production throughout India. The target of the entire mission to add 20 gigawatts of grid-connected capacity and 2 gigawatts of off-grid capacity by 2022. The controversial characteristics of the NSM relate to its payment structure and the use of DCRs. The long-term power purchase contracts between developers and the relevant government entities bundle the relatively expensive solar powered electricity with cheaper unallocated energy quotas through the government, which lowers the average cost of power. Additionally, out of the total capacity of 750 megawatts under "*Batch I*" of "*Phase II*", a capacity of 375 megawatts in total will only be allocated to developers that purchase and use solar cells and solar modules made in India. When developers bid for contracts, they must select whether they want to bid in the "*DCR*" group or the "*Open*" group. Developers may submit separate bids under each group, as well.

Following the supplemental request for WTO consultations by the US, the scope of the complaint was refined to potential violations by India under the Agreement on Trade-Related Investment Measures (hereinafter, TRIMs Agreement) and the General Agreement on Tariffs and Trade (hereinafter, GATT). Article 2.1 of the TRIMs Agreement states that WTO Members shall not apply any trade-related investment measures that are inconsistent with, *inter alia*, Article III of the GATT. The TRIMs Agreement contains a list of illustrative measures pertaining to such inconsistency, including Paragraph 1(a): measures that require "*the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production*". Under the GATT, the US cited Article III:4, alleging that the disputed measures provide less favourable treatment to imported solar cells and solar modules than the treatment accorded to '*like*' products originating in India. India has maintained, through the panel and Appellate Body stages of the dispute, that the derogation from Article III:4 contained in Article III:8(a) of the GATT applies. Article III:8(a) of the GATT states that "*[t]he provisions of [Article III] shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale*". India has also maintained that, even if it is in violation of its WTO obligations under Article III:4 of the GATT, the disputed measures are justified under the general exceptions contained in Article XX of the GATT. In particular, Article XX(d) of the GATT, which allows WTO Members to adopt or enforce measures "*necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT]*", and Article XX(j) of the GATT, which allows WTO Members to adopt or enforce measures "*essential to the acquisition or distribution of products in general or local short supply*".

The panel found that India's measures fell within Paragraph 1(a) of the illustrative list of the TRIMs Agreement, and were thus inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. With respect to the derogation from Article III:4 of the GATT contained in Article III:8(a) of the GATT, the panel, in large part, relied on the Appellate Body's Report in *Canada – Renewable Energy*. There, the Appellate Body analysed similar measures adopted by Canada regarding domestic content requirements contained in the feed-in-tariff scheme adopted by the Canadian province of Ontario. Ontario's scheme envisaged payments to developers of renewable energy projects, provided that they sourced a certain amount of their goods and services (in particular, 50% for wind projects, and to 60%

for solar projects) from Ontario-based companies. In *Canada – Renewable Energy*, the Appellate Body found that the products purchased by the government under the scheme (*i.e.*, the electricity) were not in a competitive relationship with the products subject to discrimination (*i.e.*, solar cells and modules), and thus Article III:8(a) did not apply. In *India – Solar Cells*, the panel failed to see how the facts at hand could be distinguished from those present in *Canada – Renewable Energy*, and thus reached a similar conclusion (*i.e.*, that the products subject to discrimination were not in a competitive relationship with the products purchased under the measure in question). With respect to the general exceptions contained in Article XX(j) of the GATT, the panel found that the phrase "*products in general or local short supply*" refers to a situation in which the quantity of available supply of a product, from all sources, does not meet demand in a relevant geographical area or market and, thus, India's arguments that a local short supply alone was enough to justify the use of Article XX(d), did not appear persuasive. Similarly, regarding Article XX(d) of the GATT, the panel found that the international agreements cited by India did not have "*direct effect*" in India, and that the domestic measures (which were non-binding in nature) cited by India were not laws or regulations in which the measures in dispute were necessary to "*secure compliance*" with said domestic measures, as envisaged under Article XX(d) of the GATT. Accordingly, the panel concluded that India's measures were in violation of Article III:4 of the GATT And Article 2.1 of the TRIMs Agreement.

The Appellate Body Report addresses India's appeals pertaining to Article III:8(a), Article XX(j) and Article XX(d) of the GATT. The Appellate Body agreed with all of the conclusions of the panel. With respect to Article III:8(a) of the GATT, the Appellate Body found that the panel "*rightly relied on the interpretation of Article III:8(a) developed by the Appellate Body in [*Canada – Renewable Energy*]*" and that the panel adequately considered India's arguments. With respect to the claims under Article XX of the GATT, the Appellate Body recognized that the evaluation of a defence under Article XX involves a two-tiered analysis, in which a measure must first be provisionally justified under one of the paragraphs of Article XX, and then shown to be consistent with the requirements of the *chapeau* of Article XX. Regarding the first step, part of the analysis involved determining whether the measure at dispute was "*necessary*" under Article XX(d) or "*essential*" under Article XX(j). Given that the Appellate Body had not yet had the opportunity to analyse a claim under Article XX(j), the Appellate Body related the "*indispensable*" nature of necessity with the definition of "*essential*", which it found to be "*[a]bsolutely indispensable or necessary*". Thus, the legal standards created by the two terms are similar. Accordingly, it applied a balancing test to a series of factors to assess the extent to which the measure at dispute contributes to, *inter alia*, "*'*the acquisition or distribution of products in general or local short supply*'"; the relative importance of the societal interests or values that the measure is intended to protect; and the trade-restrictiveness of the challenged measure. In most cases, a comparison between the challenged measure and reasonably available alternative measures should then be undertaken*". On balance, the Appellate Body concluded, *inter alia*, that the measures at dispute were not essential for the acquisition or distribution of products in the general or local short supply, which it agreed with the panel includes supply from all sources. Turning to Article XX(d) of the GATT, the Appellate Body agreed with the conclusion of the panel, although *via* a different analysis, that the international agreements cited by India did not have "*direct effect*" in India, and that the domestic measures cited by India were not laws or regulations in which the measures in dispute were necessary to "*secure compliance*" with said domestic measures. The Appellate Body did note, however, that such analysis should be done on a case-by-case basis and that due consideration to all of the characteristics of the relevant instrument(s) should be given, so as to avoid focusing exclusively or unduly on any single characteristic.

The result of the dispute was largely expected, given its similarities, as recognized by the panel and the Appellate Body, to *Canada – Renewable Energy*. While the dispute was ongoing, India appeared to be unwilling to challenge what may be similar measures and programmes within the US, but days prior to the public release of the Appellate Body Report, India acted. On 9 September 2016, India filed a request for WTO consultations with the US concerning certain measures relating to the renewable energy sector. India's request for WTO consultations with the US cites Article III:4 of the GATT, and Article 2.1 of the TRIMs Agreement, but also brings claims under the WTO Agreement on Subsidies and Countervailing Measures. Interested parties should monitor the dispute and observe whether the US attempts to distinguish its own measures from those already ruled to be WTO illegal under *Canada – Renewable Energy* and *India – Solar Cells*.

The UK Government announces '*clearer visual labelling*' in the form of teaspoons of '*free*' sugar

In September 2016, the UK Government published its response to the House of Commons' Health Select Committee report on '*Childhood obesity – brave and bold action*' (hereinafter, the Childhood Obesity Report), which was published on 30 November 2015. The UK Government announced that it will introduce '*clearer visual labelling*' in relation to specific sugars (not all sugars) that are easily overconsumed (*i.e.*, '*added*' or '*free*' sugars) in packaged food and drinks. This labelling scheme would be voluntary, using teaspoons of sugar or sugar cubes as front-of-pack (hereinafter, FoP) symbols.

Paragraph 100 of the Childhood Obesity Report suggests a labelling system showing teaspoons of sugar (where a teaspoon is defined as 4 grams) providing a clear and compelling visual representation of the amount of sugar in a particular product: "*A labelling system of this kind should be applied to a single-serving portions of foods and drinks with added sugar, to aid parents reducing their children's sugar consumption to recommended levels, as some 500ml bottles of soft drinks contain nearly triple a young child's recommended daily amount of sugar in a single bottle. The Government should offer manufacturers the chance to introduce this labelling voluntarily, but should be clear that it will be pursuing the introduction of labelling on a mandatory basis if companies do not adopt the voluntary scheme*".

In its response, the UK Government states that the voluntary FoP pack '*traffic light*' nutrition labelling scheme, introduced in 2013, already plays a vital role in its efforts to encourage healthier eating and to reduce levels of obesity, particularly for children. By understanding better the nutrient content of food and drinks, consumers are assisted in making healthier and more balanced choices. It announced that it will improve consumer awareness about the sugar content of foods through improved communication and labelling. Labelling of the sugar content in packaged foods will be compulsory from December 2016, and many businesses have already voluntarily provided this information on the back of packs for several years. Finally, in relation to childhood obesity, the UK Government argues that a plan for action has considered several options to make sugar labelling clearer. Current sugar labelling shows the total sugar content of foods, but the new maximum intake recommendations are based on the specific sugars that are easily overconsumed, rather than all sugars. Therefore, the UK Government will develop clearer visual labelling, on these specific sugars, in line with its new sugar intake recommendations.

The indication of the total sugar content (in 100 g or 100 ml) in pre-packaged foods will, in fact, be compulsory from 14 December 2016 under the nutrition labelling provisions in *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). The FIR harmonises nutritional information on energy and on certain nutrients on food in the EU (which, for the time being, still includes the UK). Prior to 14 December 2016, nutrition labelling is optional under the FIR's predecessor, *Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs* and is compulsory only in two cases: 1) where a nutrition claim appeared on the labelling, in presentation or in advertising; or 2) on fortified foods to which vitamins and minerals have been added. The FIR establishes, in Article 32(2) and (4) and in Article 33 thereof, the forms of expression and, in Article 34(2), how nutrition labelling must be presented. Article 35(1) of the FIR permits additional forms of expression and/or presentation of the energy value and the amount of nutrients (*i.e.*, fat, saturates, carbohydrate, sugars, protein and salt) by other forms, using graphical forms or symbols in addition to words or numbers. This provision would apply to the voluntary UK teaspoon or sugar cube FoP symbols, similar to the UK '*traffic light*' FoP scheme.

Such additional forms of expression and/or presentation must comply with the following requirements: "*(a) they are based on sound and scientifically valid consumer research and do not mislead the consumer; (b) their development is the result of consultation with a wide range of stakeholder groups; (c) they aim to facilitate consumer understanding of the contribution or importance of the food to the energy and nutrient content of a diet; (d) they are supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer; (e) in the case of other forms of expression, they are based either on the harmonised reference intakes set out in Annex XIII, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients; (f) they are objective and non-discriminatory; and (g) their application does not create obstacles to the free movement of goods*". The requirements that additional forms of expression and/or presentation must meet pose quite a challenge. According to Article 35(2) of the FIR, EU Member States may recommend to food business operators (hereinafter, FBOs) the use of one or more additional forms of expression or presentation of the nutrition declaration that they consider as best fulfilling the requirements set out above (regarding the difference of '*additional forms of expression and/or presentation*' and '*voluntary food information*' under Article 36 of the FIR, see *Trade Perspectives*, Issue No. 21 of 20 November 2015).

The UK Government's '*clearer visual labelling*' in form of teaspoons or cubes of sugar includes only specific sugars that are easily overconsumed (*i.e.*, '*added*' or '*free*' sugars) and not all types of sugars (per 100gr or ml), which, under the FIR, must be indicated on nutritional labels as of 14 December 2016. A question may be whether this difference is clear to the average consumer and if the likely '*teaspoon*' symbol, in the words of the FIR, "*facilitates consumer understanding of the contribution or importance of the food to the energy and nutrient content of a diet" and "is supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer".* Differentiating '*free*' from '*naturally occurring*' sugar is complex, *inter alia*, when it comes to juices, yoghurt and dairy products. In comments relating to the new US nutrition label, which requires the indication of '*added*' sugars, the EU considered that the lack of an analytical method to distinguish naturally present and added sugars is a serious obstacle that would lead to difficult compliance assessments and that the determination of added sugars is only feasible by using recipe and process information. EU law, as well as, at the international level, the *Codex Alimentarius,* refer to '*total sugars*', without a subcategory of '*added sugars*'.

It must be noted that the US Food and Drug Administration (hereinafter, FDA) amended its food labelling regulations to provide updated nutrition information on the so-called '*Nutrition Facts*' label, as well as the format and appearance of the label. FBOs will have to comply, as of 26 July 2018 (or on 26 July 2019 for FBOs with less than USD 10 million in annual food sales), with the new rules, which were published in the Federal Register on 27 May 2016. The new rules amend 21 C.F.R. (Code of Federal Regulations) § 101 on food labelling under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs, in particular § 101.9 thereof, on nutrition labelling of food. Among the many changes of the '*Nutrition Facts*' label, which include larger font for the number of calories and servings per container, is a new line of text located just underneath '*total sugars*'. In this new line of text, FBOs are required to indicate exactly how much of the total sugars include '*added sugars*', and what percentage of the daily value is represented by those added sugars. The word '*includes*' is intended to clarify that added sugars are a sub-component of total sugars (see *Trade Perspectives*, Issue No. 11 of 3 June 2016).

When there is no analytical method to distinguish naturally present and added sugars, a question arises concerning the difference between '*total*' and '*free*' sugars. The UK Scientific Advisory Committee on Nutrition (SACN) defines *'total*' sugars, which are described on nutrition labels in the carbohydrate section under '*of which sugars*', as *"added sugars and sugars naturally present in foods and drinks (including milk)". 'Free*' sugars, similar to the term '*added*' sugars used in the US, are *"sugars added to foods by the manufacturer, cook or consumer, plus sugars present naturally in honey, syrups and unsweetened fruit juices (not including sugars naturally present in milk)".* Under this definition, according to the SACN, *"lactose naturally present in milk and milk products and sugars contained within the cellular structure of foods would be excluded"* from the new UK symbol for '*free*' sugars.

While the justification of the new labels to fight obesity constitutes a legitimate and '*noble*' objective, it still must respect EU's internal market rules. When such measures are proposed or put into place in the UK, '*Brexit'*, and its possible scenarios relating to the internal market, add another layer of uncertainty for consumers and the food industry (see *Trade Perspectives*, Issue No. 16 of 9 September 2016). Not everyone is likely to be keen to another UK FoP label for added sugars. FoP '*traffic light*' labels have been criticised since their introduction in 2014. In fact, in October 2014, the Commission initiated infringement proceedings against the UK over its '*traffic light*' nutrition labelling scheme (see *Trade Perspectives*, Issue No. 19 of 17 October 2014). The UK scheme is a hybrid FoP food labelling scheme that includes '*percentage reference intakes*' (formerly known as '*guideline daily amounts*', or GDAs) and colour coding indicating whether or not the product is high (*i.e.*, red), medium (*i.e.*, amber) or low (*i.e.*, green) in fat, saturated fat, sugar and salt (depending on its content per 100 g). The scheme is, in principle, voluntary, similar to the proposed '*teaspoon*' scheme, but was recommended in June 2013 by the UK Food Standards Agency (hereinafter, FSA) and the Department of Health. A similar recommendation for the proposed '*teaspoon*' scheme by the UK authorities can be expected. The Commission's formal letter of notice initiating infringement proceedings against '*traffic light*' scheme stated that it shares the UK's objectives of public health and the fight against obesity. However, following complaints from FBOs that the use of such scheme would negatively affect the marketing of several products, the Commission decided to open an investigation. Reportedly, a spokesperson for the Commission at the Agriculture and Fisheries Council meeting on 14 March 2016 was only able to comment that the infringement procedure is ongoing. For the moment, the UK is still an EU Member State and, as such, has to comply with EU food labelling laws.

Three legal issues are of particular relevance: 1) the question of whether a scheme like the UK's FoP '*traffic light*' or '*sugar teaspoons*' nutrition labelling scheme is a '*voluntary scheme*'; 2) whether certain elements of such scheme can be classified as '*non-beneficial*' nutrition claims; and 3) whether the proliferation of such schemes are obstacles to the free movement of goods in the EU, contrary to the Treaty of the Functioning of the European Union (hereinafter, TFEU) (for more details, see *Trade Perspectives*, Issue No. 21 of 15 November 2013). The classification of a number of '*teaspoon*' symbols as '*non-beneficial*' nutrition claims appears likely. However, the UK Government has already announced that '*Brexit*' will provide '*greater flexibility*' in relation to FoP nutrition information.

The soft drinks industry in the UK faces another development. The UK Government already announced a soft drinks levy as the first step of its plan to tackle childhood obesity, and launched a consultation on the details of the levy 18 August 2016. The levy rates will be announced after the consultation and will presumably be legislated in the Finance Bill 2017, with implementation expected from April 2018 onwards. This levy on drinks with added sugar, currently exempts dairy products, although some flavoured milks are as high in sugar as some soda drinks. The UK Government has stated, in its Childhood Obesity Action Plan, that: *"[w]e want to make sure that any milk drink which is exempt from the levy is sufficiently high in milk content that the product carries the nutritional benefits of milk. As such we intend that only pre-packaged drinks containing at least 75% milk would be outside the scope of the levy. Where a drink contains less than 75% milk and also contains added sugar, with a total sugar content of 5g/100ml or more, then it will be subject to the levy*". The levy will make soft drinks manufacturers pay a charge for drinks with added sugar. Pure fruit juices would not be taxed, because they do not contain added sugar. Article 110 of the TFEU prohibits internal discriminatory taxation, directly or indirectly, on products of other EU Member States, in excess of that imposed directly or indirectly on similar domestic products. In relation to taxation, '*Brexit*' and its possible scenarios for the UK's future relations with the EU must be taken into account.

Schemes like the '*traffic light*' or '*teaspoon*' nutrition label and also the myriad of FoP schemes developed in France (see *Trade Perspectives*, Issue No. 21 of 20 November 2015) and the '*activity equivalent*' calorie labelling proposed by the UK Royal Society of Public Health on 15 January 2016, taking the form of prominent pictorial icons alongside existing FoP nutritional information, in order to increase consumer awareness both of the calories contained within food and of the activity required to '*burn off*' such calories (see *Trade Perspectives*, Issue No. 2 of 29 January 2016), may soon be addressed in a dedicated Commission report. Article 35(5) of the FIR requires the Commission to submit to the EU Parliament and Council by 13 December 2017 a report on the use of additional forms of expression and presentation, on their effect on the internal market, and on the advisability of further harmonisation of those forms of expression and presentation. The Commission may accompany this report with proposals to modify the relevant EU provisions. Interested food industry stakeholders must continue to monitor the developments in relation to food taxes, labelling requirements and advertising bans.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2016/1647 of 13 September 2016 Re-imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in Vietnam and produced by Best Royal Co. Ltd, Lac Cuong Footwear Co., Ltd, Lac Ty Co., Ltd, Saoviet Joint Stock Company (Megastar Joint Stock Company), VMC Royal Co Ltd, Freetrend Industrial Ltd and its related company Freetrend Industrial A (Vietnam) Co, Ltd, Fulgent Sun Footwear Co., Ltd, General Shoes Ltd, Golden Star Co, Ltd, Golden Top Company Co., Ltd, Kingmaker Footwear Co. Ltd, Tripos Enterprise Inc., Vietnam Shoe Majesty Co., Ltd, and implementing the judgment of the Court of Justice in joined cases C-659/13 and C-34/14*

Food and Agricultural Law

- *Commission Implementing Decision (EU) 2016/1685 of 16 September 2016 authorising the placing on the market of products containing, consisting of, or produced from genetically modified maize Bt11 × MIR162 × MIR604 × GA21, and genetically modified maizes combining two or three of the events Bt11, MIR162, MIR604 and GA21, and repealing Decisions 2010/426/EU,* *2011/892/EU, 2011/893/EU and 2011/894/EU(notified under document C(2016) 5746)*

Other

- *Council Decision (EU) 2016/1623 of 1 June 2016 on the signing, on behalf of the European Union and provisional application of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part*

- *Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part*

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