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As '*Brexit*' negotiations approach their conclusion, the EU is debating the reapportionment of tariff-rate quotas post-'*Brexit*'

On 22 May 2018, the European Commission (hereinafter, Commission) had published its legislative proposal of a *Draft Regulation of the European Parliament and of the Council on the Apportionment of Tariff Rate Quotas Included in the WTO Schedule of the Union Following the Withdrawal of the United Kingdom from the Union and Amending Council Regulation (EC) No 32/2000* (hereinafter, Draft Regulation). The Council of the EU (hereinafter, Council) and the European Parliament are currently debating their respective position on the Draft Regulation before entering into interinstitutional negotiations. The Draft Regulation seeks to implement into EU law an agreement reached with the UK in 2017 on how to apportion the tariff-rate quotas (hereinafter, TRQs), provided for in the EU's Schedule of Concessions agreed within the World Trade Organization (hereinafter, WTO), between the EU and the UK. The approach will have direct consequences on trade and traders around the world.

On 29 March 2017, the UK Government had officially notified the EU of its intention to withdraw from the EU and, in its '*Brexit*' Bill, the UK formally committed to leave the EU at 23:00 GMT on 29 March 2019. '*Brexit*' negotiations take place since June 2017, but a number of key issues remained unresolved for a long time. In recent weeks, progress appears to have been made and, on 13 November 2018, the EU and the UK reached '*technical agreement*' on the withdrawal arrangement. It was approved by the UK Cabinet, but it still remains unclear if the agreement will receive approval by the UK Parliament. Since the beginning of 2018, negotiations also focused on the questions of a transition period and the future relationship between the EU and the UK. On 23 March 2018, the EU confirmed having reached agreement on a transition period from 29 March 2019 until 31 December 2020 (see *Trade Perspectives*, Issue No. 7 of 6 April 2018).

The Draft Regulation with four concise articles and its Annex, listing the TRQs, was proposed by the Commission on 22 May 2018. Recital 6 details the methodology used to determine the proposed apportionment: 1) The UK's usage share (*i.e.*, the UK's share of total EU imports under the TRQ over a recent representative three-year period) for each individual TRQ is established; 2) The usage share is then applied to the entire scheduled TRQ volume to arrive at the UK's share of a TRQ; and 3) The EU's share then consists of the remainder of the TRQ in question, which ensures that the total volume of a given TRQ is not changed. Article 1 of the Draft Regulation provides that, as regards TRQs for agricultural products, the EU's portion be as set out in Part A of the Annex and, as regards TRQs for non-agricultural products, the EU's

portion be as set out in Part B of the Annex. Article 2 of the Draft Regulation provides that Annex I to *Council Regulation (EC) No 32/2000 opening and providing for the administration of Community tariff quotas bound in GATT and certain other Community tariff quotas and establishing detailed rules for adjusting the quotas* be replaced by the text in Part B of the Annex. Importantly, with respect to the process, given the tight time frame until '*Brexit*' and the possibility that such negotiations not be completed before that date, the Commission's Draft Regulation, in its Articles 3 and 4, also outlines the procedure for a unilateral apportionment of the TRQs should no agreement be reached in time with the other relevant WTO Members.

On 16 October 2018, the Council's Customs Union Working Party approved the text of the Draft Regulation and, on 29 October 2018, submitted it to the EU's Permanent Representatives Committee, which, on 31 October 2018, adopted the Presidency's compromise text. The Council proposes a number of changes to the recitals, notably adding a Recital noting that it would be essential that the Regulation entered into force as soon as possible. More importantly, due to different legal bases (*i.e.*, four TRQs for certain fishery products are not administered under *Regulation (EC) No 32/2000,* but under *Commission Regulation (EU) No 847/2006*, which implements *Council Decision 2006/324/EC*), the Council adds a new Part C to the Annex relating to fisheries, which, in the original Draft Regulation, is integrated into Part B on '*non-agricultural goods*'. This is also reflected in a new Article 5, which would empower the Commission to adopt implementing acts to amend *Regulation (EU) No 847/2006* in order to adjust the volumes of the TRQs opened and managed by that Regulation. In Article 3, the Council adds a new sentence, underlining that, when adopting delegating acts, the Commission should, in particular, ensure "*that the market access into the Union as composed after the withdrawal of the United Kingdom does not exceed that which is reflected in the share of trade flows during a representative period*". Finally, the Council adds the Committee procedure to the Draft Regulation, noting that, in the context of the tasks laid out in the Draft Regulation, the Commission be assisted by the Customs Code Committee.

The European Parliament is also preparing its position on the Draft Regulation. On 8 November 2018, the European Parliament's Committee on International Trade tabled the Committee's report on the Draft Regulation. In essence, the INTA report provides for three main changes: 1) In view of legal certainty, the specific methodology used as the basis for the apportionment of the existing TRQs between the EU and the UK should be included in the Draft Regulation itself; 2) The clarification of the scope of the delegated powers to the Commission, extending the time period for delegated acts from four to five years and making the delegation of powers renewable for another five years; and 3) Incorporating into the Draft Regulation all amendments that would need to be brought to *Regulation (EC) 32/2000*. The report will now be discussed by the European Parliament's plenary at one of the next plenary sessions and will form the basis of the European Parliament's position in the interinstitutional negotiations with the Council and the Commission. Once both institutions, European Parliament and Council, have agreed on their respective position, interinstitutional '*trilogue*' negotiations may commence with a view of reaching a compromise on the Draft Regulation.

In parallel to the internal EU discussions and the related ordinary legislative procedure for the adoption of the Draft Regulation, negotiations on the actual TRQ apportionment are already ongoing in Geneva. TRQs determine the quantities of goods that may be imported duty-free or at lower tariffs (in-quota rates). Once the quota is filled, the regular higher tariff applies (out-of-quota rate). Typically, TRQs are particularly important with respect to agricultural and fishery products. In view of the often wide gap existing between the in-quota and the out-of-quota tariff rates, the TRQ allocation is of key importance. The question of TRQs and whether they are administered on a country-specific or most-favoured nation (MFN) basis is one of the most important and often contentious issues associated with the opening and management of TRQs. Country-specific TRQs are not necessarily inconsistent with WTO rules, as Article XIII:2(d) of the General Agreement on Tariff and Trade (hereinafter, GATT) 1994 expressly allows quotas to be allocated among supplying countries, which in practice means the exclusion of other WTO Members because not all Members can normally be considered as supplying countries. However, in accordance with Article XIII:2 of the GATT 1994, the core requirement with respect to the allocation of TRQs is to "*aim at a distribution of trade in such*

product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions". The preferred way of allocating TRQs under Article XIII of the GATT 1994 is to do so on the basis of agreement among all WTO Members that have a substantial interest in supplying the product. If that is not practical, the unilateral decision of the importing country may suffice. In this latter case, however, the importing country is required to allocate the TRQs "*based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product*".

On 11 October 2017, the EU and the UK Missions to the WTO in Geneva had sent a joint letter to the WTO Members' Permanent Representatives, providing the plans for the '*Brexit*' transition, most notably the intended approach for the reapportionment of the TRQs, currently applicable to all 28 EU Member States (see *Trade Perspectives*, Issue No. 19 of 20 October 2017). With respect to the quantitative commitments in the form of TRQs, the future quotas are supposed to be established through an apportionment of the EU's existing commitments and based on current trade flows under each TRQ. Both sides announced that they would follow "*a common approach, inter alia*, *to data and methodology and to engage actively with WTO Members on these*". Even before this letter was sent out in mid-October 2017, the Permanent Representatives of seven important trading partners (*i.e.*, Argentina, Brazil, Canada, New Zealand, Thailand, the US, and Uruguay) had sent a letter to the EU and the UK, voicing their concerns over the considered apportionment of the current TRQs. Reportedly, concerns particularly related to TRQs for meat products. The concerns by those countries also reflect the current situation of the EU Single Market, where an EU TRQ applies to all 28 Member States and where a product exported to a specific EU Member State can still be seamlessly moved onwards to another EU Member State. Such seamless onward trade would not exist anymore, should the UK leave the EU Single Market and the Customs Union, as envisaged. The EU and the UK considered the apportionment of the TRQs between the EU and the UK to be an adaptation of the WTO Schedule to the new post-'*Brexit*' situation and started bilateral discussions in order to adjust their Schedules without engaging in renegotiations under Article XXVIII of the GATT and with the intention of using the quicker procedure foreseen within the WTO for rectification. However, certain WTO Members and major exporters of agricultural products to the EU responded in a joint letter to the EU and UK and noted their concerns with respect to the intended approach, considering that the intended changes were more than a rectification of the Schedules, would lead to decreased flexibility, and would affect market access for their exporters. They further noted that, if market access conditions were to change due to the proposed quota apportionment, additional concessions were needed in order to compensate for the loss of market access. They concluded that modifications of the EU's and UK's current WTO commitments should be adopted with their agreement.

Therefore, on 26 June 2018, the Council of the EU authorised the Commission to open formal negotiations within the WTO on how to apportion the existing EU's TRQs between the EU27 and the UK. The Draft Regulation provides that, in line with WTO rules, the "*apportionment of tariff rate quotas that are part of the Union's schedule of concessions and commitments will have to occur according to Article XXVIII of the General Agreement on Tariffs and Trade 1994*" and that the EU would "*therefore, following completion of preliminary contacts, engage in negotiations with WTO Members having a principal or substantial supplying interest or holding an initial negotiating right in relation to each of these tariff rate quotas*". Still, at a meeting of the WTO Committee on Market Access in October 2018, several countries expressed concerns over the methodology and the accuracy of the import data that had been provided by the EU to justify its proposal to modify its current WTO commitments as a consequence of Brexit.

While the current debate within the EU on the Draft Regulation is important and might become controversial, it is only the precursor for the more decisive negotiations with relevant WTO Members with supplying interest. An important sector in this regard will be the meat sector, particularly with respect to beef and poultry, where important trade disputes were fought out in

the past and in the context of WTO dispute settlement proceedings (on poultry, see *Trade Perspectives*, Issue No. 18 of 5 October 2018, and, on beef, see Issue No. 17 of 21 September 2018). With '*Brexit*' approaching, the time for negotiations is constrained and the EU is likely to face difficult negotiations with its trading partners. In addition to the EU's procedures, the UK needs to launch the procedures within the WTO for establishing its own Schedule of Concessions and commitments after 30 March 2019. Stakeholders and exporters around the world should carefully assess the proposed TRQs and the relevant procedures, while negotiations at the WTO are ongoing.

Raw material supply for chocolate at risk? Cocoa-producing countries raise the issue of upcoming EU maximum levels for cadmium in chocolate and other foodstuffs

On 1 January 2019, new maximum levels of cadmium in specific cocoa and chocolate products established by *Commission Regulation (EU) No 488/2014 of 12 May 2014 amending Regulation (EC) No 1881/2006 as regards maximum levels of cadmium in foodstuffs* (hereinafter, *Regulation (EU) 488/2014*) will enter into force and look poised to particularly affect EU chocolate production. This has led to serious concerns in cocoa-producing countries, such as Colombia, Côte d'Ivoire and Peru, which have repeatedly raised the issue of the new EU rules on cadmium in chocolate as a Specific Trade Concern (STC) at the meetings of the World Trade Organization's (hereinafter, WTO) Committee on Sanitary and Phytosanitary Measures (hereinafter, SPS Committee) during the course of this year. More specifically, Peru argued that *Regulation (EU) 488/2014* was "*not based on updated scientific principles with respect to the risk to human health*" and that the practical application amounted to a "*disguised restriction on international trade*".

In 2014, the Commission adopted *Regulation (EU) 488/2014*, which amends *Commission Regulation (EC) No 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs*. Among other changes, *Regulation (EU) 488/2014* introduced maximum levels of cadmium for milk and dark chocolates. Cadmium is a heavy metal that occurs naturally in the soil, and small molecules in water and air, as well as in pesticides and fertilisers. The roots of cocoa trees absorb the metal, which subsequently finds its way into tree leaves and cocoa beans. *Regulation (EU) 488/2014* aims at protecting public health and keeping contaminants at levels that are toxicologically acceptable. Of note in this context is a study conducted in 2014-2017 by the Cocoa Research Centre of the University of the West Indies, and funded by the EU Association of Chocolate, Biscuits and Confectionery (CAOBISCO), the European Cocoa Association (ECA), and the Federation of Cocoa Commerce (FCC), which led to a better understanding of the different factors affecting cadmium and uptake of the metal. Three possible solutions for mitigation were proposed: 1) Grafting onto low cadmium root stock plants; 2) Breeding new varieties that are not as prone to cadmium uptake; and 3) Modifying soils to reduce plant cadmium uptake.

Notably, *Regulation (EU) 488/2014* takes into account the European Food Safety Authority's (hereinafter, EFSA) *Scientific Opinion on cadmium in food - Scientific Opinion of the Panel on Contaminants in the Food Chain*, which was adopted on 30 January 2009. The EFSA's scientific opinion stated that, for non-smokers, 90% of cadmium intake comes from food. It also pointed out that, while the absorption of cadmium in the human body is relatively low (3 to 5%), the metal can stay in the body for ten to thirty years, increasing the possibility to cause damage to kidneys, liver and lungs. *Regulation (EU) 488/2014* sets maximum levels of cadmium in chocolate, cocoa products and food for infants and young children, respectively. Prior to *Regulation (EU) 488/2014*, these products did not have an established maximum level. For milk chocolates with less than 30% cocoa content, a product that is most popular among children, the rules are particularly strict with a maximum level of 0.10 mg/kg of cadmium. The maximum level means that products with a higher level may not be sold in the EU. The maximum level permitted for milk chocolate with more than 30% of cocoa content and other chocolate with less than 50% is set at 0.30 mg/kg of cadmium, while the maximum level

permitted for chocolate with more than 50% cocoa content, and cocoa powder, will be at 0.80 mg/kg and at 0.60 mg/kg of cadmium, respectively. The Regulation also established a time deferral in order to allow EU Member States and food businesses operators to adapt to the new maximum levels. The maximum levels for cocoa and chocolate products will only enter into force on 1 January 2019.

The new maximum levels have been the subject of discussions among EU trading partners, already back in 2011/2012 when the EU began debating the new maximum levels, and more recently during the course of this year shortly before the entry into force of the new limits. On 1 and 2 November 2018, at the most recent WTO SPS Committee meeting, WTO Members Colombia, Côte d'Ivoire and Peru called for discussions on the EU maximum levels of cadmium in specific cocoa and chocolate products. Peru already actively raised the issue at previous SPS Committee meetings in March and in July of this year. Based on previous submissions and interventions at previous SPS Committee meetings, Peru reiterated questions regarding the merits of the EU's maximum levels of cadmium in specific chocolate products and the impact that these could have on the Peruvian economy. While Côte d'Ivoire is the world's most important producer and exporter of cocoa beans and cocoa preparations, Peru is also considered by the International Cocoa Organization (hereinafter, ICCO) as an important producing and exporting country of so-called fine or flavour cocoa, which accounts for 75% of overall production in Peru. Peru is the eighth largest producer of cocoa in the world and the EU is Peru's main export destination, receiving more than 70% of Peru's total cocoa bean exports. Within the EU, Peru's major export destinations in 2017 were Belgium (16,608,000kg), the Netherlands (11,954,000kg), and Italy (6,655,000kg). The EU's new maximum levels could significantly affect production in Peru, which could even jeopardise programmes implemented a few years ago to convert lands previously used for coca plantations into cocoa plantations.

On 9 October 2018, Peru tabled a second submission to the SPS Committee (a previous one was submitted in June 2018), in which it reiterated its concerns on the legality of *Regulation (EU) 488/2014* and its inconsistency with the WTO SPS Agreement. Peru noted that the maximum levels that *Regulation (EU) 488/2014* established for cocoa and chocolate products would have a negative impact on trade in cocoa beans from Peru to the EU and other international markets. In its submission, Peru stated that the EU had been unable to demonstrate sufficient scientific evidence to support the maximum levels established in the Regulation. First, Peru argued that the Joint Expert Committee on Food Additives (*i.e.*, JECFA) by the United Nations Food and Agriculture Organization (FAO) and the World Health Organization (WHO) considered "*a food to represent a risk when it contributes 5% or more of the maximum tolerable intake of the contaminant*". Taking into account these parameters, Peru stated that "*there were no grounds for including chocolate and cocoa products in* [Regulation (EU) 488/2014]*, since they contribute only 4.3% to dietary cadmium exposure*". Second, Peru stated that there is "*a serious inconsistency*" in *Regulation (EU) 488/2014* "*in that it establishes the same maximum level of cadmium (0.10 mg/kg) for potatoes and chocolate (up to 30% cocoa), in spite of the fact that potatoes contribute 13.2% to overall dietary exposure to cadmium – a much higher percentage than chocolate – and have a different consumption pattern"*. Following these arguments, Peru stated that *Regulation (EU) 488/2014* infringes Articles 2.2 and 2.3 of the WTO SPS Agreement because it is "*not based on updated scientific principles with respect to the risk to human health of consuming these products* [*i.e.*, chocolate and cocoa], *and because the practical application of these limits, inter alia to cocoa beans (not included in the Regulation), is resulting in a disguised restriction on international trade in cocoa beans and cocoa products*".

Additionally, Peru stated that Regulation (EU) 488/2014 violates Article 5.1 and 5.4 of the WTO SPS Agreement on the "*Assessment of risk and determination of the appropriate level of sanitary or phytosanitary protection*", since no proper assessment was made concerning the consumption of chocolate, as a potentially relevant source of cadmium consumption as a risk to human health. Furthermore, according to Peru, "*when determining the appropriate level of sanitary protection of the European population",* there was no consideration given by the EU *to* "*the objective of minimizing the negative effects on trade in chocolate, cocoa powder and cocoa beans of applying the limits set by the Regulation*". During the SPS Committee meeting

of 12 and 13 July 2018, the EU reacted to the remarks by other WTO Members and pointed out that the maximum levels established by *Regulation (EU) 488/2014* were indeed based on risk assessments and scientific opinions from the EFSA. In addition, the Commission stated that the ESFA's scientific report of 30 January 2009 had concluded that cadmium exposure should be reduced and that certain population subgroups already exceeded the "*tolerable weekly intake*", while subgroups, such as children, might face exposure levels that are double those of the tolerable weekly intake. The EU also noted that the EU limits for chocolate containing more than 50% cocoa content were consistent with maximum levels agreed within *Codex Alimentarius*.

Additionally, a number of WTO Members suggested that the EU was applying a hazard-based approach instead of risk-based approach. A '*hazard-based approach*' refers to the regulation of a certain product on a precautionary basis, when the substance is known to have severe health effects, even though there is not enough evidence of consumer exposure to the hazardous substance. However, the WTO SPS Agreement requires WTO Members to use a '*risk-based approach*', which also evaluates whether there is exposure to the substance. These comments are in line with Peru's statement regarding the lack of a proper assessment on the risk to human health concerning the consumption of chocolate, as potential source of cadmium intake. In its submission of 9 October 2018, Peru requested the EU to exclude chocolate products from the scope of *Regulation (EU) 488/2014* until it provided additional scientific evidence of the risk level that cadmium represents for human health. In addition, Peru also requested the EU to wait until the Codex Committee on Contaminant and Foods (*i.e.*, CCCF) finalised the Codex standards, which is currently under preparation, and in order to avoid unnecessary restrictions to trade. The next CCCF meeting is scheduled to take place from 29 April to 3 May 2019 and Members are scheduled to develop rules for chocolate with less than 50% cocoa content. Other WTO Members, such as Colombia, Ecuador, Guatemala and Côte d'Ivoire, also urged the EU to wait for these expected new rules. In the past, EU trade association CAOBISCO also argued for the general consistency of international levels and EU levels. The EU stated that the measure could not be delayed any longer and that it had already provided five years to alleviate the difficulties of trading partners to achieve compliance.

Another issue raised during the SPS Committee meeting of July 2018, and reportedly again raised at the most recent SPS Committee meeting in November, is the concern by Ecuador of the application of *Regulation (EU) 488/2014* by businesses. Although Ecuador notes that cocoa beans were not part of the Regulation, Ecuador pointed out that "*Ecuadorian exporters had been reporting that EU importers seemed to be applying* [Regulation (EU) 488/2014*] already and incorrectly, that is, not to the finished products (chocolates and certain cocoa-based products) as provided in the measure, but to the input material (cocoa beans)*". Ecuador explained that, while this was not a private standard, it referred to the incorrect application by private entities of the Regulation. Therefore, Ecuador asked the EU to monitor the application in order to guarantee "*the proper application of this Regulation, to avoid an unnecessary barrier to trade, much more burdensome than what the Regulation provided for, even prior to its official implementation*". The EU recognised that private operators applied cadmium limits to imported cocoa beans instead of finished products, without respecting the transitional period of five years granted by the Regulation, which was incorrect and not in line with the Regulation. The EU considered that this concern went beyond the scope of the SPS Agreement and pointed out that the concern focused on actions of commercial operators, over whom official authorities from the EU Member States have jurisdiction. Therefore, the EU stated that the issue should be raised in other *fora*, such as the ICCO.

The imminent entry into force of new maximum levels for cadmium in specific cocoa products and chocolate under *Regulation (EU) 488/2014* is of concern not only to producing countries, but also to chocolate producers in the EU that depend on a stable supply of cocoa imports for their production. The implementation of possible cadmium mitigation measures is not simple for the producing countries and might take additional time. It is unlikely that the entry into force would still be postponed, but the EU should be aware of the consequences for both operators and producing countries. Considering the sharp criticism by certain cocoa-producing countries, the issue could very well become subject of WTO dispute settlement consultations and

proceedings. Interested stakeholders should closely monitor the developments and ensure that their respective perspectives are taken into account.

The European Commission registered a European Citizens' Initiative on the mandatory labelling for non-vegetarian, vegetarian and vegan products

On 12 November 2018, the European Commission (hereinafter, Commission) registered a European Citizens' Initiative (hereinafter, ECI) on the mandatory labelling for non-vegetarian, vegetarian and vegan products. The ECI notes that vegetarians and vegans "*struggle across the EU*" to identify suitable food, and *"must study the ingredients list of a food product (…) with a hyper-awareness of ambiguous ingredients that could either be plant or animal based*". The organisers of the ECI (*i.e.*, the natural persons forming a citizens' committee responsible for the preparation of an ECI) note examples such as "*honey, anything that contains gelatine, and certain beers that are filtered with animal products*" and call on the Commission to propose mandatory pictorial labels on all food products indicating whether they are non-vegetarian, vegetarian, or vegan.

The Treaty on European Union (hereinafter, TEU) reinforces citizenship of the EU and provides that every citizen has the right to participate in the democratic life of the EU by way of the ECI (established in Articles 11(4) and 24 of the TEU). Such procedure affords citizens the possibility of directly approaching the Commission with a request inviting it to submit a proposal for a legal act similar to the right conferred on the European Parliament under Article 225 of the Treaty on the Functioning of the European Union (hereinafter, TFEU) and on the Council under Article 241 of the TFEU. In April 2012, *Regulation (EU) No 211/2011 on the citizens' initiative* entered into force, implementing the Treaty provisions. Once formally registered, an ECI allows one million citizens from at least one quarter of EU Member States to invite the Commission to propose a legal act in areas where the Commission has the power to do so. The conditions for admissibility, as foreseen by *Regulation (EU) 211/2011*, are that the proposed action does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act, that it is not manifestly abusive, frivolous or vexatious, and that it is not manifestly contrary to the values of the EU.

The Commission's decision to register the ECI on mandatory labelling for non-vegetarian, vegetarian and vegan products concerns only the legal admissibility of the initiative. At this stage, the Commission has not yet assessed the substance. The registration of the ECI on 12 November 2018 kicked off a one-year period, during which the ECI organisers may collect the required one million signatures of support. The fate of an ECI can vary quite significantly. Since the entry into force of *Regulation (EU) 211/2011* in April 2012, 50 ECIs have been registered, and an estimated almost ten million statements of support have been collected by the different organisers. Nine initiatives are currently open, including, in the area of food labelling law, an ECI entitled '*Eat ORIGINal! Unmask your food*', registered on 19 September 2018, with the stated objective of imposing mandatory declarations of origin for all food products "*in order to prevent fraud, protect public health and guarantee consumers' right to information*". 15 ECIs were withdrawn and 26 received only insufficient support. Only four ECIs successfully reached the one million signatures threshold. For example, the ECI '*Ban glyphosate and protect people and the environment from toxic pesticides*' was submitted to the Commission on 6 October 2017 and gathered 1,070,865 statements of support. The Commission adopted a Communication on 12 December 2017 setting out the actions it intended to take in response, concluding that there were neither scientific nor legal grounds to justify a ban of glyphosate and that it would not make a legislative proposal to that effect. It adopted, however, a *Proposal for a Regulation on the transparency and sustainability of the EU risk assessment in the food chain* on 11 April 2018 strengthening the transparency in the risk assessment process and providing additional guarantees of reliability, objectivity and independence of the studies used by the European Food Safety Authority (EFSA) in risk assessments (see *Trade Perspectives*, Issue No. 18 of 5 October 2018).

The organisers of the ECI on mandatory labelling for non-vegetarian, vegetarian and vegan products propose that food business operators label their products in one of three ways: 1) '*Not Vegetarian*', for food products containing animal parts and/or by-products; 2) '*Vegetarian*', for food products that may contain animal by-products; and 3) '*Vegan*', for 100% plant-based food products. According to the organisers, each of the three categories should have a symbol to be placed on the food's packaging and labelling, much like the symbols that packaged foods carry in India. In India, packaged food products are required to be labelled with a mandatory symbol in order to be distinguished between vegetarian and non-vegetarian. The symbols are in effect on the basis of India's *Food Safety and Standards (Packaging and Labelling) Act* of 2006 and became mandatory after the adoption of the respective *Food Safety and Standards (Packaging and Labelling) Regulations* in 2011. Accordingly, vegetarian food must be identified with a green symbol and non-vegetarian food with a brown symbol. '*Non-vegetarian food*' is defined in the *Food Safety and Standards (Packaging and Labelling) Regulations* as "*an article of food which contains whole or part of any animal including birds, fresh water or marine animals or eggs or products of any animal origin, but excluding milk or milk products, as an ingredient*". '*Vegetarian Food*' is defined as "*any article of food other than Non-Vegetarian Food*".

In the EU, the matter of defining the terms '*vegetarian*' and '*vegan*' food appears to be more complex. Article 36(3)(b) of *Regulation (EU) No. 1169/2011 on the provision of food information to consumers* (hereinafter, FIR) expressly requires the Commission to adopt an implementing act on how to provide information on the suitability of foods to vegetarians or vegans, which is currently only provided on a voluntary basis. Such implementing act should ensure that the labelling is not ambiguous or confusing for the consumer, and must, where appropriate, be based on relevant scientific data. The FIR does not provide for a date by which the Commission is required to adopt such implementing act and the Commission has not yet done so. On 24 October 2017, the Commission announced, in its Regulatory Fitness and Performance Programme (*i.e.*, REFIT), that, in 2019, it would begin the drafting process for an implementing act to the FIR, establishing legal definitions of the terms '*vegetarian*' and '*vegan*' food. In response to the inaction by the Commission, there have been efforts at the EU Member States' level. For instance, on 22 April 2016, the Consumer Protection Ministers of the 16 German Federal States (*i.e.*, *Bundesländer*) unanimously adopted a decision on binding definitions of the terms '*vegan*' and '*vegetarian*' (see *Trade Perspectives*, Issue No. 21 of 17 November 2017). The Ministers did not agree on a formal food labelling law, which is in the competence of the Federal German Government. However, they agreed on joint political positions, which, in this case, have an important effect, as the Ministers decided that the food control authorities within their jurisdictions would use the definitions whenever they have to decide whether a food may be labelled '*vegan*' or '*vegetarian*'. In another recent development, in March 2018, the German Food Book (*i.e.*, *Deutsches Lebensmittelbuch*) Commission announced that it was developing guidelines for vegan and vegetarian food.

Considering the growing number of vegans, vegetarians and flexitarians (*i.e.*, persons that have a primarily vegetarian diet, but occasionally eat meat or fish) and the increasing market relevance of vegan and vegetarian products, legally binding definitions for the terms '*vegan*' and '*vegetarian*' appear essential for guaranteeing informed choices by consumers. The food industry has developed a range of products, which are offered as vegan, vegetarian or under similar terms, such as '*plant-based*' or '*animal products-free*'. Numerous labels and marks for vegetarian and vegan food have been developed in the EU and elsewhere. The most prominent is perhaps the V-Label, registered in 1996 as a private, non-governmental, international symbol for labelling vegan and vegetarian products and services. Standardised criteria aim at ensuring that the V-Label is a unique seal of quality for vegan and vegetarian products all across Europe. The holder of the trademark rights, the Switzerland-based V-Label GmbH, notes that the definitions it uses comply with the definitions adopted by Ministers in Germany.

It appears that, in order to provide clarity and to avoid confusion among consumers, rules on the use of the designations '*vegan*' and '*vegetarian*' of products are indeed needed. The matter is, however, much more complex than differentiating between '*vegetarian*' and '*non-vegetarian*'

food, such as in the example of Indian law, put forward by the organisers of the ECI. For example, the decision adopted by Ministers in Germany defines in its first paragraph '*vegan*' foods. Such foods may not be of animal origin and no: 1) Ingredients (including additives, carriers, flavourings and enzymes); or 2) Processing aids; or 3) Substances, which are not food additives (but are used in the same way and with the same purpose as processing aids), of animal origin may be used or added, in either processed or unprocessed form, at any stage of their production and processing. According to paragraph 2 of the decision, '*vegetarian*' foods must meet the requirements of paragraph 1 with the difference that, in their production, the following may be added or used: milk, colostrum, eggs, honey, beeswax, propolis (a resinous mixture that honey bees collect from tree buds, or other botanical sources) and lanolin or their components or derivatives. Importantly, the definitions not only include the substances contained in the final product, but also those used at all production stages. In particular, the concepts of '*food*' and '*ingredient*' of the FIR, as well as the definitions of processing aids according to *Regulation (EC) No. 1333/2008 on food additives* and so-called '*quasi-processing aids*' according to Article 20(1)(d) of the FIR have been integrated. As the use of processing aids cannot always be analytically detected in final products, monitoring depends on appropriate supporting documents. Plants, before harvesting, do not fall under the definition of food. Agricultural production methods would, therefore, fall outside the scope of the definition of '*vegan*' foods. The question arises whether, for example, animal-origin fertilisers should be regarded in a broader sense as processing aids because they are '*used*' in the production process. If so, animal-origin fertilised crops would arguably not be '*vegan*'.

The Commission's current inaction leads, ultimately and as the example of Germany shows, to the fragmentation of the internal market and to possible obstacles to the free movement of foodstuffs within the EU. Products that are labelled as '*vegan*' or '*vegetarian*' (or with similar terms) in other EU Member States, and which do not comply with the definitions established in Germany, could be considered misleading. To avoid this, changes to the labels are required and, in some cases, producers may be forced to reformulate their products to be able to access the German market. Arguably, establishing definitions for '*vegan*', and '*vegetarian*' food would also be useful in the context of denominations for plant-based meat alternatives, if those are also denominated '*vegan*' or '*vegetarian*' (see *Trade Perspectives*, Issue No. 9 of 4 May 2018).

With respect to defining terms like '*vegan*' and '*vegetarian*', it is also interesting to look at the international context. At the *Codex Alimentarius* level, between 1997 and 2000, proposals were presented for definitions of '*vegan*', '*ovo-lacto vegetarian*' and '*lacto vegetarian*', for possible inclusion in either the General Codex Standard for the Labelling of Prepackaged Foods (*i.e.*, CODEX STAN 1-1985), or, as conditional claims, in the General Codex Guidelines on Claims (*i.e.*, CAC/GL 1-1979). In 2000, the Codex Committee on Food Labelling (hereinafter, CCFL) agreed to discontinue work on Proposed Draft Guidelines for the Use of the Term '*Vegetarian*', as the differences in the definition and understanding of the term from country to country were too wide to allow for the development of guidelines at the international level, and it was not possible to establish a common definition. However, most recently, at the 44th Session of the CCFL, held from 16 to 20 October 2017, delegates discussed a paper on basic criteria for so-called '*consumer preference claims*', which may address certain marketing terms and claims used, such as '*natural*', '*no preservatives added*', '*vegan*', and '*vegetarian*'.

Interested stakeholders should monitor the fate of the ECI. The Commission has already stated that, in 2019, it would begin the drafting process for an implementing act to the FIR, establishing legal definitions of the terms '*vegan*' and '*vegetarian*'. A successful ECI would send a strong signal to the Commission to act. If the ECI were to gather enough support by 11 November 2019, it would invite the Commission to propose a legal act and the Commission would have to carefully examine the initiative. Within 3 months after receiving the initiative, the Commission would have to adopt a formal response spelling out what action it intends to propose in response to the ECI, if any, and the reasons for doing or not doing so. The response, which will take the form of a communication, would be formally adopted by the College of Commissioners. It appears likely that, sooner or later, and despite the apparent complexities of the issue, the EU and EU Member States will act on the labelling of products suitable for vegans and vegetarians.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2018/1722 of 14 November 2018 amending Implementing Regulation (EU) No 999/2014 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an interim review pursuant to Article 11(3) of Regulation (EU) 2016/1036 of the European Parliament and of the Council*

- *Resolution on ACP-EU relations post-Cotonou: a strong parliamentary dimension*

Food and Agricultural Law

- *Resolution on the impact of the illegal trade in phytosanitary products, seeds and other agricultural inputs on ACP countries' economies*

Other

- *Commission Decision (EU) 2018/1733 of 14 November 2018 approving, on behalf of the European Union, the modification of Appendix 1 to Annex XIII to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Ecuador and Peru, of the other part*

- *Resolution on ACP-EU relations post-Cotonou: a strong parliamentary dimension*

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