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US requests formation of a WTO panel regarding China's treatment of US suppliers of electronic payment services

The US has requested the establishment of a WTO panel to adjudicate a US complaint concerning China's treatment of US suppliers of electronic payment services. The US request was heard at the meeting of the WTO's Dispute Settlement Body on 24 February 2011. At this meeting, China formally blocked the US' request for the formation of a panel. According to Article 6(1) of the WTO's Dispute Settlement Understanding, China will not be able to block a second US request for the formation of a panel at a subsequent meeting of the Dispute Settlement Body.

The US argues that, under the terms of the Accession Protocol of China to the WTO, China should have fully implemented its commitments to remove market access and national treatment limitations in its electronic payment services sector by 11 December 2006. China apparently denies that it made such a commitment. The US requested WTO consultations on 15 September 2010. However, these consultations did not resolve the dispute.

The US alleges that, over the past decade, the People's Bank of China has issued regulations that have granted China UnionPay, a Chinese state company, a monopoly over managing the electronic card transactions done in Chinese yuan, while simultaneously excluding other potential suppliers of electronic payment services. The US is apparently challenging the requirement that all Chinese electronic payment processing terminals be compatible with China UnionPay's system, while foreign electronic payment service companies must negotiate access with each individual merchant. The US is also challenging the practice whereby foreign electronic payment suppliers are apparently only permitted to process payment card transactions paid in foreign currency within China. US electronic payment services companies are also disputing the fact that, when Chinese citizens travel overseas, their credit card transactions must reportedly be handled by China UnionPay.

US suppliers of electronic payment services are concerned by what they describe as a situation whereby foreign visitors to China can use foreign credit cards, but American companies are denied a piece of the lucrative Chinese domestic business of processing transactions between merchants and intermediary banks. Reports suggest that Chinese consumers spent 722 billion USD in electronic payment transactions in 2009, and this figure is expected to double by 2012.

Many of the world's largest providers of credit card and debit card services are headquartered in the US, making this issue a key concern in the context of the US promotion of liberalised trade in international services. US trade officials are reportedly interested in restraining other emerging economies from imposing similar restrictions on the US electronic payment services industry. The growing ranks of the middle class in emerging countries

constitutes a potentially lucrative growth market for electronic payment services companies, and the US is eager for its companies to have access to these business opportunities.

Article 3(a) of the Accession Protocol of China to the WTO commits China to abide by the principle of national treatment concerning foreign enterprises in respect of the '*prices and availability of goods and services supplied by national and sub-national authorities and public or state enterprises, in areas including transportation, energy, basic telecommunications, other utilities and factors of production*.' The US would likely argue that the word '*including*' indicates that this list is merely illustrative, and is a non-exhaustive list of service areas in which China is obliged to provide national treatment. China may respond that the list is in fact exhaustive and does not apply to the electronic payment services processing industry.

In its request for the establishment of a WTO panel, the US further argues that China has imposed market access limitations and discriminatory limitations on foreign electronic payment services suppliers in violation of, respectively, Articles XVI and XVII of the General Agreement on Trade in Services (hereinafter, GATS). In arguing that Article XVI of the GATS has been violated, the US will likely highlight Article XVI:2(a), whereby WTO Members are prohibited from adopting a limitation on the number of service suppliers in the form of monopolies. With respect to its Article XVII claim under the GATS, the US may refer to paragraph 17 of the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999. Here, it was noted that there is a '*general understanding that national treatment commitments cover the supply of services through electronic means unless otherwise specified*'.

The US – China dispute over the provision of electronic payment services highlights a larger trend in US – China trade relations, whereby the US is bringing an increasing number of service trade complaints against China at the WTO. US service industries have long sought greater access to service markets as part of an eventual agreement in the Doha Round. Given the *impasse* in the Doha talks, US service suppliers appear to be more assertive in lobbying the US Government to defend their trading interests abroad using the WTO's dispute resolution mechanism. Business parties with an interest in the US services industry and/or in the supply of electronic payment services in China should follow this dispute with particular attention.

New EU rules on '*comitology*' set to enter into force on 1 March 2011

On 1 March 2011, new rules laying down the procedures on the EU Commission's exercise of its implementing powers will come into force. The so-called 'new *comitology* rules', adopted by the EU Council through a regulation in co-decision with the EU Parliament, give effect to Article 291 of the Treaty on the Functioning of the European Union (hereinafter, TFEU) and replace the consultation, management and regulatory procedures that currently apply pursuant to Council Decision 1999/468 (hereinafter, 'old *comitology* decision') for EU Commission implementing acts.

Required under Article 291 of the TFEU, the 'new *comitology* rules' provide the rules and procedures concerning mechanisms for control by EU Member States of the EU Commission's exercise of its implementing powers. The implementing powers are exercised by the EU Commission where (i) the implementation of EU legally binding acts (such as directives and regulations) requires 'uniform conditions' in the EU Member States; and (ii) where such powers have been conferred to the EU Commission by the legislator in such acts. Similarly to the system set up through the 'old *comitology* decision', the EU Member States' control over the EU Commission's implementing powers is effected through the establishment and work of committees, composed by representatives of EU Member States,

and chaired by a representative of the EU Commission, to which the EU Commission submits the draft implementing measures. Among the novelties of the new system, there is the possibility of referring the draft implementing measures to an appeal committee, replacing the possible intervention of the EU Council, which is no longer foreseen. In addition, the new rules extend the '*comitology*' to the adoption of acts undertaken under the common commercial policy, notably trade defence instruments, previously subject to special rules.

The 'new *comitology* rules' foresee two basic procedures: the examination procedure and the advisory procedure. The application of one or the other procedure will be decided in the basic EU act conferring implementing powers, taking into account the nature or impact of the implementing acts required. As a general rule, the examination procedure will apply to the adoption of acts of general scope and other specific acts concerning the following: programmes with substantial budgetary implications; the common agricultural and fisheries policies; the environment and the security and safety or protection of the health or safety of humans, animals or plants; the common commercial policy; and taxation.

In particular, the examination procedure is structured in a three-tier process whereby: (i) the EU Commission drafts a proposal for the implementing act; (ii) the proposal is submitted to the examination committee; and (iii) the examination committee votes on the EU Commission's proposal. The examination committee decides whether to deliver a positive opinion, no opinion, or a negative opinion by qualified majority.

Where the opinion is positive, the implementing act is adopted. Where the examination committee delivers a negative opinion, the EU Commission must not, as a general rule, and subject to the specific derogations foreseen in the 'new *comitology* rules', adopt the act. In such instances, where the draft implementing act is deemed necessary, the Chair of the committee may either refer the draft act to the appeal committee within one month for amendments and further deliberations or submit an amended version of the draft act within two months. The appeal committee, composed of higher-ranking representatives of EU Member States and chaired by a representative of the EU Commission, may also deliver, by qualified majority, a positive opinion, no opinion or a negative opinion. In the latter case the act must not be adopted. Where no opinion is delivered by the appeal committee, the EU Commission may adopt the draft act unless it concerns definitive multilateral safeguards, which the EU Commission may not adopt in the absence of a positive opinion voted by qualified majority.

Finally, where the examination committee delivers no opinion, the EU Commission may adopt the draft act unless (and subject to the same specific derogations that apply in case of negative opinion): (i) the act concerns, *inter alia*, the protection of health or safety of humans, animals or plants, or definitive multilateral safeguards; or (ii) this is provided by the basic legislative act conferring implementing powers to the EU Commission; or (iii) a simple majority opposes the adoption of the draft act. Again, in such instances, where implementing acts are deemed necessary, the Chair of the committee may either refer the draft act to the appeal committee within one month for amendments and further deliberation or submit an amended draft act within two months. In addition, special rules apply where the draft act concerns the adoption of definitive anti-dumping or countervailing measures and a simple majority opposes the draft act. These require, *inter alia*, the EU Commission to consult with EU Member States and to submit the draft implementing act to the appeal committee.

The advisory procedure applies for the adoption of implementing acts not falling into the areas which are subject to the examination procedure and it requires the advisory committee to deliver an opinion, if necessary by voting through simple majority. The EU Commission must make a decision by taking '*utmost account*' of the conclusions reached, or the opinions delivered, by the committee.

Under the new rules, in practice, implementing acts may be adopted where a qualified majority of EU Member States does not expressly oppose the acts, with the exception of multilateral safeguards. Notably, the new rules have strengthened the EU Commission's role in the adoption of anti-dumping and countervailing duties. First, definitive duties will now be adopted by the EU Commission, exercising its implementing powers. Secondly, the new rules require stronger support to avoid the adoption of the duties: whereas the EU basic anti-dumping and anti-subsidy regulations require that an EU Commission proposal in favour of the duties be adopted by the EU Council unless it decides by a simple majority to reject the proposal, now, in practice, and except for the first 18 months from the entry into force of the new rules, only a qualified majority in the committee may prevent the adoption of duties. Different rules apply for the adoption of multilateral safeguard measures, which, under the new rules, still require a qualified majority in favour of the measure.

Yet, it remains to be seen whether, in subjecting the vote on the adoption of anti-dumping and countervailing duties to the (more technical) committee level, the new rules will contribute to render the decision-making process on trade defence instruments less political. Under the 'new *comitology* rules', where no opinion is delivered by the committee on a draft act proposing the adoption of anti-dumping and countervailing duties, the opposition of a simple majority will trigger additional consultations and the intervention of the appeal committee. In addition, the 'new *comitology* rules' still leave a powerful tool to EU Member States by allowing them to suggest amendments to the EU Commission's proposed anti-dumping and countervailing duties, both at the examination committee as well as at the appeal committee. In such instances, the Chair must endeavour to find solutions which command the widest possible support within the committee, or inform the committee of the manner by which the discussions and suggestions for amendments have been taken into account, particularly where such suggestions are supported within the committee. This mechanism may provide EU Member States with the ability to 'soften' the decisions taken by the EU Commission through the proposed act. In general, the 'new *comitology* rules' appear to maintain to some extent EU Member States' ability to intervene in decisions taken in the area of trade defence instruments.

Update on the EU proposal for a Food Information Regulation - mandatory nutrition declaration and introduction of mandatory '*defrosted*' designation

On 21 February 2011, at a session of the Agriculture and Fisheries Council (hereinafter, Council) in Brussels, the EU Council adopted its first-reading-position on a draft regulation on food information for consumers (hereinafter, the FIR). The decision was taken without a debate, and the Italian delegation voted against the position. The EU Parliament had issued its position at a first reading on 16 June 2010. In January 2008, the EU Commission had put forward a proposal for a regulation on the provision of food information to consumers. The proposal intended to merge, amend and introduce further provisions in existing EU legislation in relation to the labelling, presentation and advertising of foodstuffs, with the aim of establishing a modernised, simplified and coherent EU scheme (see Trade Perspectives Issues No. 1 of 14 January 2010 and No. 12 of 18 June 2010).

One of the key elements of the EU Council's position is the mandatory nature of the nutrition declaration: labelling the energy value and the quantities of fat, saturates, carbohydrates, protein, sugars and salt would become compulsory. As a general principle, the energy value and the amounts of these nutrients would have to be expressed per 100g or per 100ml. They could, however, also be indicated as a percentage of reference intakes. Food business operators could also use additional forms of expression or presentation as long as certain conditions are met (*i.e.*, they do not mislead consumers and are supported by evidence of

consumer understanding). All elements of the nutrition declaration should appear together in the same field of vision, but some of them may be repeated on the '*front of pack'.*

However, the EU Council's position also contains other proposals that appear to be of great relevance to the food industry, such as making it mandatory for food products that were previously frozen, but are sold as un-frozen, to be accompanied by the term *'defrosted'* next to the product name. Article 17(5) of the FIR provides that specific provisions on the name of the food and particulars that shall accompany it are laid down in Annex VI. Article 18(2) of the FIR states that ingredients shall be designated by their specific name, where applicable, in accordance with the rules set out in Article 17 and in Annex VI thereof. Part B of Annex VI concerns the mandatory particulars accompanying the name of the food. Similar to the wording of Article 5(3) of Directive No. 2000/13/EC on the labelling, presentation and advertising of foodstuffs, point 1 of Part B of Annex 1 of the FIR provides that *'the name of the food shall include or be accompanied by particulars as to the physical condition of the food or the specific treatment which it has undergone (for example, powdered, freeze-dried, quick-frozen, concentrated, smoked) in all cases where omission of such information could mislead the purchaser'.* However, in contrast to the EU Parliament's legislative resolution of 16 June 2010, which in its amendment 225 suggested adding the terms *'refrozen'* and *'defrosted'* to the enumerative list of examples above, the EU Council's position now adds a completely new point 2 to Part B of Annex VI of the FIR, which states that *'(I)n the case of foods that have been frozen before sale and which are sold defrosted, the name of the food shall be accompanied by the designation 'defrosted''.*

It is unclear why the provision on the designation *'defrosted'* has been included in the EU Council's position. What is arguable is that, as the list in the current Article 5(3) of Directive No. 2000/13/EC on the labelling, presentation and advertising of foodstuffs consists of examples, a designation such as *'defrosted'* would already currently need to be placed next to the name of the food in all cases where the omission of such information could mislead the purchaser. The question is whether this has happened so far; is there a belief and is there evidence that customers are being misled? However, what the Council is now proposing appears to be a significant evolution. The term *'defrosted'* would always have to be indicated; it would not matter whether an omission may mislead the consumer or not.

It should be borne in mind (at least according to the introductory paragraphs 18-19 of the FIR) that *'in order to enable food information law to adapt to consumers' changing needs for information, any considerations about the need for mandatory food information should also take account of the widely demonstrated interest of the majority of consumers in the disclosure of certain information*' and '*New mandatory food information requirements should however only be established if and where necessary, in accordance with the principles of subsidiarity, proportionality and sustainability'*.

Representatives from the food industry, and in particular the bakery products industry, are concerned, and have stated that this new requirement will add logistical complications and costs to the packaging and labelling of chilled foods. Given that certain stocks are built up during the year, particular '*peak demand products*', such as confectioneries and pastries for Christmas or Easter, would be particularly impacted, as not all of these '*peak demand products*' are sold shortly after the time they are produced. In addition, retailers commonly only freeze a portion of stocks according to demand. The new labelling requirement would thus mean parallel labelling for some goods.

The proposed legislation seems to be also applicable to food product ingredients. Ingredients are sometimes shipped from around the world and frozen at different stages of delivery in order to preserve their physical integrity and maintain stock levels. More space will be required on labels if the labels must declare whether certain ingredients have been defrosted. The food industry will face logistical difficulties in differentiating between products

that have and have not been frozen. An open question is whether this makes a significant difference for consumers and whether '*non-defrosted*' products are perceived by consumers to be superior. There are, however, many good reasons to freeze foodstuffs, or at least certain ingredients: better management of demand, the reduction of waste, and providing consumers with more choice.

This case shows how mere details in the proposed FIR may have a significantly wider impact. Industry members concerned should therefore analyse the Council's position in depth. The Council's position will now be forwarded to the EU Parliament for its second reading. The adoption of the EU Parliament's ENVI Committee 2nd reading report is scheduled for 14 April 2011. The indicative date for the EU Parliament's plenary vote is 5 July 2011. As stakeholders continue to be divided in their opinions on the new rules, intense lobbying activities are expected over the next few weeks. The FIR is expected to be finalised and published in early 2012, with transition periods for new mandatory labelling requirements.

Canada requests the formation of a WTO panel regarding the EU's ban on Canadian seal products

Following unsuccessful consultations between Canada and the EU, Canada has requested the creation of a WTO panel to adjudicate its challenge of the EU's ban on the import of Canadian seal products. Canada's request will be heard at the next meeting of the WTO's Dispute Settlement Body on 24 February 2011.

The Canadian Fisheries Minister, Gail Shea, has stressed the apparently negative impact of the import ban on approximately 6,000 Canadian families that reportedly rely on sealing. Canada has defended the seal hunt as a humane and responsible use of a renewable Canadian resource. By contrast, the EU Commission has defended the import ban as being consistent with the EU's obligations under international law and its obligations to respond to the concerns of EU citizens regarding the manner with which the seal hunt is conducted.

The EU's import ban on Canadian seal products was originally based on a 2007 report by the European Food Safety Authority, which presented scientific evidence of inhumane killing and skinning of seals in Canada for commercial purposes (see Trade Perspectives Issue No. 3 of 13 February 2009). That same year, Belgium and the Netherlands imposed bans on the importation and trade of Canadian seal products. In response to these measures, Canada lodged a request for WTO consultations on 25 September 2007. Canada requested the formation of a panel in its dispute with Belgium and the Netherlands on 11 February 2011.

Canada has also requested the formation of a WTO panel in relation to the seal import ban imposed by the EU. This dispute originated in November 2009, when Canada requested consultations regarding the EU's implementation of Regulation (EC) No. 1007/09 of 16 September 2009 (hereinafter, the Seals Regulation). According to the Seals Regulation, adopted by the EU Council on 26 July 2009, seal products are permitted to be placed on the EU market only in limited, largely non-commercial, circumstances, including, *inter alia*, where the seal products result from hunts traditionally conducted by Inuit and other native communities. Article 3 of the Seals Regulation clarifies that the restrictions apply '*at the time or point of import*'. The Seals Regulation therefore results in an import ban on most Canadian seal products (see Trade Perspectives, Issue No. 10 of 22 May 2009).

The General Court of the EU originally granted a request by seal hunters, Inuit representatives, and processing groups from Canada, Norway and Greenland, for an injunction against the Seals Regulation. The injunction was granted on 19 August 2010, one

day before Article 3 of the Seals Regulation was set to become applicable. The suspension of the Seals Regulation was limited to Article 3, which specifically concerns the import ban on seal products.

However, on 25 October 2010, the General Court of the EU issued a final decision that cancelled the 19 August 2010 injunction. The applicants in the case had hoped to win an *interim* order suspending the effect of the import ban during the course of the court proceedings. Instead, the court decided that there was no need to delay the ban for the duration of the court proceedings, ruling that it had not been presented with sufficient evidence to conclude that the ban would damage seal hunting communities.

In its request for the formation of a panel, Canada argues that the EU's ban on Canadian seal imports is a quantitative restriction inconsistent with GATT Article XI:1, given that WTO Members cannot limit the importation of any product by any method other than '*duties, taxes or other charges'*. Additionally, Canada considers that the ban discriminates against Canadian seal products *vis-à-vis* EU domestic products and other WTO Member States' products, which would be a violation of the National Treatment principle under GATT Article III:4 and of the Most-Favoured Nation clause under GATT Article I:1. Canada also argues that the EU's import ban is a violation of several provisions of the Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement). In particular, Canada argues that the import ban violates, *inter alia*, Article 2.2 of the TBT Agreement, as the ban allegedly creates an unnecessary obstacle to international trade, lacks a legitimate objective, and is more trade restrictive than necessary to fulfil a legitimate objective, if any such objective were to be proved to exist.

Canada's argument in relation to Article 2.2 of the TBT Agreement raises the legal question of whether the EU's seal import ban is '*necessary*' to achieve the EU's animal welfare goals. Assessing the possible success of Canada's argument under Article 2.2 of the TBT Agreement is difficult. First, the EU may argue that the import ban does not qualify as a '*technical regulation*' under Annex 1:1 of the TBT Agreement. Second, there is little existing jurisprudence on the application of Article 2.2 of the TBT Agreement. In *EC – Sardines*, the Panel included in its analysis of Article 2.4 of the TBT Agreement some observations relevant to Article 2.2 of the TBT Agreement. The Panel noted that both the preamble and Article 2.2 of the TBT Agreement operate to afford WTO Members a degree of deference with respect to their domestic policy objectives. This part of the panel ruling was, however, overturned by the Appellate Body. It noted that the Panel had decided to exercise judicial economy with regards to Article 2.2 of the TBT Agreement, and thus the Panel's findings with respect to the relevant analysis on trade-restrictiveness under Article 2.2 of the TBT Agreement had no legal effect.

Some analysts have cautioned that, by challenging the EU's seal import ban, the Canadian federal government may be jeopardising the success of the ongoing Canada – EU negotiations for a bilateral FTA, known as the Comprehensive Economic and Trade Agreement (hereinafter, CETA). Given the significant economic stakes of the CETA negotiations, the Canadian federal government may actually be trying to separate the seal import ban issue from the CETA negotiations. Due to Canada's decentralised political system, any final CETA deal must be supported by each of Canada's provinces. FTA negotiations between Canada and the EU in 2005 were scuttled due to provincial non-cooperation. To avoid the same outcome with the CETA talks, the federal government may be pursuing the WTO seal challenge in response to a request from the province of Newfoundland, which has an influential sealing lobby. WTO dispute panels normally take 12 to 18 months to deliberate and issue a ruling. This timeframe may allow Canada and the EU to conclude the CETA negotiations before a WTO panel delivers its decision in the seal dispute. Given the sensitive legal and political dynamics of both the CETA negotiations and

the seal import ban, commercial parties interested in the outcome of either issue should monitor closely the developments in the Canada – EU sealing dispute.

Recently Adopted EU Legislation

Market Access

- *Commission communication on the body authorised to issue certificates of origin under Regulation (EC) No 891/2009*

- *Commission Regulation (EU) No 144/2011 of 17 February 2011 amending Regulation (EU) No 206/2010 laying down lists of third countries, territories or parts thereof authorised for the introduction into the European Union of certain animals and fresh meat and the veterinary certification requirements*

- *Commission notice concerning the quantity not applied for to be added to the quantity fixed for the subperiod 1 April to 30 June 2011 under certain quotas opened by the European Union for pigmeat products*

- *Commission notice concerning the quantity not applied for to be added to the quantity fixed for the subperiod 1 April to 30 June 2011 under certain quotas opened by the European Union for poultrymeat, eggs and egg albumin*

Trade Remedies

- *Council Implementing Regulation (EU) No 167/2011 of 21 February 2011 terminating the partial interim review of the anti-dumping measures applicable to imports of certain polyethylene terephthalate originating, inter alia, in the Republic of Korea*

- *Commission Regulation (EU) No 138/2011 of 16 February 2011 imposing a provisional anti-dumping duty on imports of certain open mesh fabrics of glass fibres originating in the People's Republic of China*

- *Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of sodium cyclamate originating in the People's Republic of China*

- *Notice of initiation of an anti-dumping proceeding concerning imports of sodium cyclamate originating in the People's Republic of China, limited to two Chinese exporting producers, Fang Da Food Additive (Shen Zhen) Limited and Fang Da Food Additive (Yang Quan) Limited, and of initiation of a review of the anti-dumping measures on imports of sodium cyclamate originating in the People's Republic of China*

- *Commission Regulation (EU) No 118/2011 of 10 February 2011 imposing a provisional anti-dumping duty on imports of certain ring binder mechanisms originating in Thailand*

Customs Law

- *Commission Regulation (EU) No 177/2011 of 24 February 2011 temporarily suspending customs duties on imports of certain cereals for the 2010/2011 marketing year*

- *Corrigendum to Commission Regulation (EU) No 177/2010 of 2 March 2010 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code*

- *Communication concerning the entry into force, in trade between the European Union and the countries of the Common Market of the South (Mercado Común del Sur — Mercosur), of the provisions laid down in Commission Regulation (EEC) No 2454/93, concerning the definition of the concept of 'originating products' for the purpose of applying tariff preferences granted by the European Union to certain products from developing countries (regional cumulation of origin)*

Food and Agricultural Law

- *Commission Regulation (EU) No 172/2011 of 23 February 2011 fixing for 2011 the amount of aid in advance for private storage of butter*

- *Commission Regulation (EU) No 162/2011 of 21 February 2011 determining the intervention centres for rice*

- *Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of GMOs in their territory'COM(2010) 375 final — 2010/0208 (COD)*

- *Opinion of the European Economic and Social Committee on the 'Proposal for a Council regulation (EURATOM) laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency (Recast)' — COM(2010) 184 final — 2010/0098 (CNS)*

Eugenia Laurenza, Ignacio Carreño, Nicholas Richards-Bentley and Paolo R. Vergano contributed to this issue.

FratiniVergano specializes in European and international law, notably WTO and EU trade law, EU agricultural and food law, EU competition and internal market law, EU regulation and public affairs. For more information, please contact us at:

FRATINIVERGANO
EUROPEAN LAWYERS

Rue de Haerne 42, B-1040 Brussels, Belgium Tel.: +32 2 648 21 61 - Fax: +32 2 646 02 70
www.FratiniVergano.eu

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