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 **NORTON ROSE FULBRIGHT**

Cultivate

Food and agribusiness newsletter

Issue 11 / June 2016

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Sugar tax – a sign of things to come?
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Canadian farmers protest against new
changes in legislation
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The race to produce quinoa
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Understanding the French
agricultural crisis



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Cultivate

Cultivate delivers market insight into the global food and agribusiness sector. It is published four times a year by Norton Rose Fulbright and is available online and in print.

Cultivate

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Editorial

In this, our eleventh issue of Cultivate, we focus on the Australian food and agribusiness sector, an industry which feeds approximately 60 million people worldwide. Our focus includes an interview with Geoff Honey, CEO of Grain Trade Australia about the role of Australia's grain industry in global and particularly Asian food security. We also explore the impact of COP 21 and the Paris agreement by reviewing Australia's mitigation efforts towards climate change, and take a look at the likely impact of the Australian Government's recent Agricultural Competitiveness White Paper. Finally, as the Australian government looks to strengthen the agricultural sector in its region, we review the new foreign investment regime and how it seeks to establish stronger competition in agricultural supply chains.

Beyond Australia we shine a spotlight on a range of topics from the consultation on a proposed "Sugar Tax" in the UK and workplace legislation affecting farmers in Canada to the tensions between the EU's Common Agricultural Policy and its competition law policy. We also examine the challenges facing French agriculture industry and investigate how opportunities for farmers in the US significantly expand the quinoa production, an increasingly popular food which has traditionally been grown principally in South America.

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Calendar

June

New York, USA, June 26-28

Fancy Food Show (Summer)

July

Hua Hin/Cha-am, Thailand, July 7-9

International Conference on Inventions and Innovations for Sustainable Agriculture 2016

Miami, USA, July 12-14

Global Grain North America 2016

Bogor, Indonesia, July 27

International Youth Symposium on Creative Agriculture 2016

Montreal, Canada, July 24-27

31st Symposium of the Protein Society

August

Kurume, Japan, August 5-7

IFABL 2016, Agriculture, Biology and Life Sciences

Kuala Lumpur, Malaysia, August 23-25

CAFEi 2016

Nairobi, Kenya, August 27-28

Tokyo International Conference on African Development (TICAD)

Boone, Iowa, USA, August 30 – September 1

Farm Progress Show

Food security and Australian grain – challenges and opportunities

Hazel Brasington

An interview with
Geoff Honey,
CEO, Grain Trade Australia

Grain Trade Australia is the body which oversees commodity trading standards, trade rules and the standardisation of contracts across the Australian grain industry. In his interview, Hazel Brasington, a partner in the Norton Rose Fulbright Melbourne office talks to Geoff Honey about the role of GTA and some key developments in the regulation of the Australian grain industry.

Geoff, as CEO of the peak post farm gate body for the Australian grains industry you are a busy man. What's on your mind right now?

Australia exports over 60 per cent of all the grain we produce so it is critical that we expand and maintain our access to overseas markets. Therefore, there is substantial focus on the development of international protocols that facilitate trade at the same time as being aware of issues that could arise that could lead to technical issues disrupting grain trade.



Rural scene in South Australia.

However, market development and access is dependent on a professionally trained workforce, therefore in 2016 GTA will be heavily engaged with the Australian and where possible with the international grain industry with professional training utilising our recently approved Diploma in Grain Management.

Last up and this will make you smile, along with my wife we are back yard apiarists. Yes, we keep bees for honey production (Honeys Honey). My 2016 resolution will be not to get stung so often.

Am I right in thinking that Grain Trade Australia (GTA) has some relatively new and pivotal roles?

GTA is national body that acts across the entire grain value chain and is rapidly building its reach in the Asia Pacific

region. GTA's roles include setting the annual technical quality standards, a myriad of technical and commercial projects, institutional arbitration, training and development and advocacy. GTA has come a long way from its origins as a body of mainly rural based grain trade members.

How does GTA compare with US Wheat Associates?

GTA does not do specialist market promotion like US Wheat Associates so our roles are quite different. Also, GTA has no government funding and a permanent staff approximately a tenth of USWA. GTA's strength lies in its technical and expert committees, staffed by volunteer members of unmatched dedication, experience and cross-industry expertise.

It's been a busy few months for GTA's Trade and Market Access Committee.

It certainly has. These are some of the items they are consulting and advising industry and Government on

- Proposed international phytosanitary standards
- Measures on the international movement of grain
- Global low level presence (LLP) initiative
- Cartagena Protocol on Biosafety
- Grain/dust as an explosive substance

Grain as an explosive substance. Is this a "wind up" or a real issue?

Unbelievable as it is, yes it's a real issue. A UN expert committee is considering reclassifying explosive substances and grain and grain dust could be captured. Talk about unintended consequences. Every storage and transport asset from farm to end user would have to comply with the requirements to hold an explosive substance. Cost? Unimaginable. And then there is the occupational health and safety issues.

These abrupt and confusing changes are unnecessary given proven and well-established industry safety practices, and actually could be counterproductive by creating confusion among receivers of grain and grain products.

GTA, along with our international compatriot organizations, via the International Grain Trade Coalition, are very involved in advocacy on this issue.

Can you tell us about China's new biosecurity laws?

In July 2015 the People's Republic of China (PRC) released a proposed law for the "Draft Administrative Measures for Inspection, Quarantine and Supervision of Inbound and Outbound Grains" (Chinese Measures). The proposed increased regulation of imported grain into China extends to phyto-sanitary, quality assurance and origin tracing, initiating systems of identifying producers and monitoring quality of imported grain.

What linkages have been made to other international treaty obligations?

GTA believes that there needs to be reference to major WTO Agreement in this area such as the Technical Barriers to Trade (TBT Agreement) and the Sanitary and Phyto-Sanitary Measures Affecting Trade (SPS Agreement). The current draft is not clear on linkages to these international obligations and hence it is unclear for the PRC's trading partners how the new law will affect their existing expectations and rights in China.

Furthermore, existing regulatory structures of countries that supply grain to China could be discounted, meaning that excellent standards already maintained by Australian authorities are not fully utilised.

Have the Chinese authorities consulted on this issue?

Extensively. In August, the Chinese quarantine authorities (AQSIQ) held

a workshop with the members of the International Grain Trade Coalition to discuss all aspects of the proposed new laws. AQSIQ have encouraged submissions from countries that export grain to China. It's in everyone's interests that sound legislation is enacted that assists, not hinders trade.

How do you see the Australian grain industry's role in global food security? What challenges need to be overcome for the industry to play an even greater role in feeding people around the world?

Grain is incredibly important to food security worldwide. Globally, around 1,900 to 2,000 million tonnes of grain is produced each year. Only a small percentage of this amount, however, is traded, around 15 per cent of global production.

Australia is in the unique position of being able to export 60 per cent of our grain production. Australia has also become a world leader in the development of drought tolerant technologies that could be used in developing countries too to assist in achieving food security.

Sharing this gene related technology depends on the co-existence of GM produced crop with other organic and conventionally bred crops on the market. It also depends on the trade policy protocols accommodating the worldwide trade in GM grain, in policies such as the UN Cartagena Protocol on Biodiversity and the Global Low Level Presence initiative.

GM crops are rapidly expanding as a segment of the global grain trade. Global regulatory approvals for GM products will need to be better aligned. While the use of GM crops in countries exporting grain has grown significantly, many importing countries retain zero tolerance policies on GM products – causing significant problems in the effective and efficient trade of grain, with the potential to threaten food security more generally.

Australia has addressed issues around GM by creating a system of choice and co-existence, allowing GM crops to exist side by side with conventional and organic crops in the supply chain. The Australian industry has adopted a “market choice” approach (see for example, the Canola Market Choice Framework 2007), which allows the wide variety of stakeholders such as the biotechnology industry, regulators, growers, food manufacturers and consumers) a choice of crop.

It is my hope that global trade protocols and facilities are adapted to take advantage of these products and technologies, aiding food security globally.

If you could be granted three wishes for the next year, what would they be?

Like any parent and husband your primary wishes are focused on family. However, for the purposes of this article let’s stay in the commercial space.

At the risk of a “world peace” answer, the unpredictable nature of global affairs, particularly emanating from the Middle East is a constant underlying issue from a grain trade perspective. The effects on foreign exchange markets, physical access to markets, sovereign risk etc. are all priced into the market. In some instances, traders may decide the risks at too great and not participate in a particular market. So we look to the politicians to keep a level measured response cognisant of the belief systems of this region, a region composed of the most ancient of cultures.

On another theme, increasingly political debate is being driven by emotion and fear campaigns from interest groups. Let’s back our scientists and the regulatory approval processes. Australia has world leading scientists in relation to crop breeding and Australian grain producers should have free and unfettered access to the results of their endeavours.

Last up, and I will not get drawn into the cause, but on any reading, the climate is changing and Australian grain production regions are getting hotter and dryer. So do we have a debate that the Australian climate has always swung from plenty to drought or do we recognize the facts and place substantial science into ensuring continuing and expanding grain production. If we take the science approach we will be world leaders in new technology developments.

In conclusion, there has never been a more exciting time for agriculture in general. However, to take full advantage we all need to be prepared to challenge our previous positions, hear countervailing ideas and shape positions that will facilitate the global grain trade as it continues to move grain from areas of surplus to deficit greatly assisting the global food security task.

Hazel Brasington is a partner based in our Melbourne office.

Post COP 21 and the Paris Agreement: opportunities for the land sector

Elisa de Wit

The land sector is uniquely positioned to contribute to climate change mitigation, being capable of reducing emissions resulting from agriculture and land use change, as well as offsetting emissions by sequestering carbon in vegetation and soils.

One of the primary goals of the Paris Agreement also known as COP21 is “to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century”. The land sector is likely to play an increasingly important role in the future in both reducing emissions and providing a sink to offset those emissions which ultimately cannot be removed from the atmosphere.

Emissions from the land sector

United Nations Framework Convention on Climate Change (UNFCCC) reporting indicates that agriculture is responsible for around 8 per cent of global greenhouse gas emissions, the primary sources being agricultural soils, enteric fermentation and manure management.

Total emissions from the land sector are likely to be much higher, as the UNFCCC agriculture category does not include land use, land use change and forestry, even though most land use change (such as deforestation) is undertaken for agriculture.

The Intergovernmental Panel on Climate Change estimates that the land sector accounts for 24 per cent of global emissions, the second largest contributor after the energy sector.

Opportunities in the land sector

Almost every source of emissions in the land sector is capable of achieving significant reductions using existing techniques. Current opportunities in the land sector for emissions reductions and carbon sequestration include

- 01 | Methane emissions from enteric fermentation in ruminant species can be reduced by improving the quality of feed, the use of nitrate supplements, species selection, reductions in stock numbers and the capture of biogas from manure.
- 02 | Nitrous oxide emissions from soil can be reduced by improving the efficiency with which fertilizer is applied, including applying fertilizer on the basis of plant requirements (precision agriculture).

- 03 | The organic carbon content of soil can be improved with a range of techniques, including pasture-cropping (which requires no tilling) and rotational grazing systems. Although research in the last few years has shown that the sequestration potential of soil appears to be more limited than first hoped.
- 04 | Biochar is charcoal made by heating plant matter in an oxygen-deprived chamber (a process known as pyrolysis), which can be inserted into soils to improve soil fertility and sequester carbon. The use of short rotation crops for biochar production could be used to achieve high levels of carbon sequestration.

Case study: Australia

The current centrepiece of Australia's climate change mitigation efforts is the Emissions Reduction Fund (ERF), a voluntary offsets scheme in which participants are issued carbon credits for projects which involve emissions reductions or carbon sequestration.

Almost 75 per cent of ERF projects to date have been undertaken in the land sector. These projects are jointly responsible for around 50 per cent of the greenhouse gas abatement realised under the scheme so far, which totals almost 22 million tonnes carbon dioxide equivalent.

There are a number of methods available to landholders for sequestering carbon in vegetation. The methods prescribed vary from the implementation of management regimes under which previously-cleared land naturally regenerates to a forest state, the planting of native vegetation, to the protection of native vegetation, which would have otherwise been cleared for agricultural uses.

The vast majority of vegetation projects in the ERF are undertaken on marginal land. In western New South Wales, large tracts of land which would have been subject to broadscale clearing will be preserved in a forest state under the ERF for 100 years.

The ERF includes a number of methods for reducing emissions from ruminants. Although, the only projects to be registered thus far, relate to piggeries and cover projects which involve the capture of biogas generated by the decomposition of manure waste in anaerobic lagoons, and the combustion of the methane using flaring systems.

Australia's experience showcases opportunities available in the land sector for realizing emissions reductions and carbon sequestration, and illustrates how market mechanisms can be used to incentivise these activities, directing investment towards the most efficient means of generating abatement.

Land use and forestry in the UNFCCC

The UNFCCC Convention itself does not refer to the land sector but states that parties should take action to conserve and enhance sinks and reservoirs of greenhouse gases. Several mechanisms have been developed under the UNFCCC (and subordinate instruments/decisions), which are relevant to the land sector.

Reducing Emissions from Deforestation and Degradation (REDD) is a UNFCCC mechanism designed to provide financial incentives for emissions reductions resulting from the improved management of forests in developing countries. REDD has been the subject of negotiations under the UNFCCC since 2005; however, it has had mixed results, in part, due to a lack of finance.

The Kyoto Protocol included mechanisms under which parties could meet emissions reduction targets by purchasing international credits, including credits created under the Clean Development Mechanism (CDM). The inclusion of land-use projects under the CDM was controversial. Initially, only "afforestation and reforestation" projects were permitted. This was expanded to a wider range of land-use projects for the second commitment period of the Kyoto Protocol, but they were subject to more stringent rules and so far, there has been limited uptake.

Nationally determined contributions

In the leadup to Paris, parties were required to submit “intended nationally determined contributions” (INDCs) to communicate the steps they intended to take domestically in addressing climate change.

A number of INDCs make commitments concerning forests. For example, Mexico has committed to achieve 0 per cent deforestation by 2030 and China has committed to increase forest carbon stocks by 4.5 billion cubic metres.

Several INDCs commit to reducing emissions from agricultural activities, including Kenya, Costa Rica, Vietnam and Brazil. Brazil’s INDC promises to restore 15 million hectares of degraded pasturelands by 2030 and enhance 5 million hectares of integrated cropland-livestock-forestry systems by 2030.

The Rainforest Alliance published an assessment¹ of the extent to which INDCs account for reducing emissions in the land sector. It found that the increasing recognition of the land sector is encouraging, but that many INDCs lack ambition and detail on clear pathways to achieving their goals.

The Paris Agreement

Although the Paris Agreement makes no specific reference to “land use” or “agriculture”, there are several provisions which point to future implications for the land sector.

REDD

The Agreement includes provisions relating to REDD. Article 5 states [emphasis added]

“Parties are encouraged to take action to implement and support, including through results-based payments, the existing framework

as set out in related guidance and decisions already agreed under the Convention for: policy approaches and positive incentives for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests, while reaffirming the importance of incentivizing, as appropriate, non-carbon benefits associated with such approaches.’

Paragraph 55 of the Decision (to adopt the Paris Agreement) provides that parties recognize the importance of providing adequate finance for programs including REDD.

The inclusion of REDD is notable in the Paris Agreement, given that the mechanism has been in development for over ten years. However, it remains to be seen how the provisions will be implemented and further details will need to be determined prior to the Paris Agreement taking effect.

International emissions trading

Article 6 of the Agreement provides that parties may use “internationally transferred mitigation outcomes” to meet emissions reduction targets. This article is intended to form the basis of an international trading scheme.

The introduction of a robust international emissions trading mechanism would likely provide opportunities for the land sector, which is well placed to deliver emissions reductions and sequestration. However, once again the details of this article remain to be determined, and stakeholders will be keen to ensure that any future arrangements do not repeat any of the difficulties that have been experienced with the CDM.

Long-term goals

As highlighted above, the Paris Agreement has several long-term goals, including that parties should aim to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.

This highlights the significant role that the land sector will need to play in offsetting emissions, as the world transitions towards carbon neutrality.

Conclusion

The land sector is well placed to contribute to climate change mitigation. It is a significant source of emissions and numerous opportunities exist for reducing these emissions, and for offsetting emissions through sequestering carbon.

A case study of Australia’s domestic climate change policy illustrates how market mechanisms can effectively incentivise these activities. On the international stage, the UNFCCC has previously included mechanisms which provided for land sector participation, but these have had limited success, due to inadequate finance and/or poor design.

The provisions of the Paris Agreement which are likely to be relevant to the land sector should be closely watched as future UNFCCC negotiations take place and the detail underlying these provisions is developed. Our global climate change team has been monitoring the UNFCCC negotiations for many years and is well placed to provide you with further information about the Paris Agreement and the emerging issues arising for the land sector as the Agreement gets closer to implementation.

Elisa de Wit is a partner based in our Melbourne office.

¹ Rainforest Alliance, “The Land Sector and Country Commitments to Global Climate Action” (2015) <http://www.rainforest-alliance.org/publications/indcs-assessment>.

Agricultural competitiveness in Australia – a new focus of the regulator

Belinda Harvey

The Australian Government's commitment to strengthen the agriculture sector in Australia, through ensuring it remains as competitive as possible, was articulated in its Agricultural Competitiveness White Paper in July 2015. The package allocated A\$11.4 million to boost the Australian Regulator's – the Australian Competition and Consumer Commission (ACCC) engagement with the industry, with the regulator establishing a dedicated unit which is devoted to encouraging fair-trade, taking enforcement actions and strengthening competition in agricultural supply chains. This development seeks to address the ACCC's concerns about "increasing consolidation beyond the farm gate and unfair trading practices through the agricultural supply chain".

Agribusiness mergers or acquisitions

The ACCC's new focus on agriculture will put acquisitions in this sector in the spotlight. Consolidation beyond the farm gate has always been subject to review under the merger and acquisition provisions of Australian anti-trust law. However, the impact of a merger on farmers' options for selling their produce and the extent to which it has the potential to reduce farm gate prices below the competitive level will be subject to additional scrutiny.

Australia does not operate a mandatory merger clearance regime.¹ However, the ACCC requests that it is notified of a merger or acquisition in advance of completion where it triggers market

share thresholds (greater than 20 per cent of the relevant market), or are in industries of particular interest. The ACCC's mandate to ensure that the agriculture industry remains competitive is likely to elevate it to an industry of "particular interest". Accordingly, agribusiness should be mindful that transactions are likely to be exposed to increased scrutiny and the effects of any consolidation will be assessed at all levels of the supply chain.

Enforcement action

A commitment to ensure competitive and fair trading at each level of the supply chain will highlight any inefficiencies or divergence of power in the industry. Complaints emanating from the sector will be closely examined, and the dedicated agriculture unit will be "on the ground" and in a better position to discover breaches of competition laws. The extra funding received from the Government

has seen the ACCC make a commitment to bring more cases involving agriculture before the courts.

The package does not give the ACCC any new powers. It will continue to utilise its powers under the Competition and Consumer Act 2010 (CCA) to tackle cartel conduct, arrangements that have the purpose or effect of substantially lessening competition, and as highlighted in the White Paper, prioritise truth in labelling (in particular origin labelling to let consumers know where food is grown and processed). The ACCC will continue to closely watch the market for any misuse of market power. Amendments to Australia's market power legislation which addresses an abuse of dominant position are proposed for later this year. The disparity between negotiating positions at each level of the agricultural supply chain will undoubtedly be assessed against the new laws.

Promoting economic efficiency, investment and innovation

Bottlenecks in rail and ports have the potential to hinder competition and efficient investment in the supply chain, while unregulated access to monopoly infrastructure can increase the costs associated with the supply of products to the end consumer. The ACCC supports some form of regulation with respect to ports and rail to address monopolistic pricing and rent transfers which contribute to inefficient economic outcomes. Further, and in line with the Government's focus on innovation, the ACCC will seek to

¹ Notwithstanding that a formal requirement for notification does not exist in Australia, the ACCC can initiate its own review into mergers or acquisitions irrespective of the parties view that informal clearance is not required, if it is an area of interest to the Commission.



Australian Parliament House in Canberra

ensure the market dynamics support an environment that allows for innovation and promotes pro-competitive market structures to incentivise investment.

Agribusiness in the spotlight

It is inevitable that agribusinesses and operators of infrastructure that service the industry from farm gate through to the end consumers will be the subject of increased examination by the ACCC. Market studies² to understand the operation of the industry will shine a

² The ACCC announced on 5 April 2016 that it will commence a study into the beef and cattle industry, examining competition, efficiency, transparency and trading issues in the beef and cattle supply chain.

spotlight on inefficiencies in the supply chain, and consequently, investigation into the causes of the failure to achieve a competitive marketplace will ensue.

Abuse of a dominant position will be investigated rigorously and action taken, where possible, to deter any misuse of the inequality in bargaining position. Assessment of any mergers or acquisitions will focus on ensuring that the amalgamation of businesses, whether they be competitors or operating at different levels of the supply chain, will not substantially lessen competition at any level of the

market. The way forward is a nose to tail approach, with no level of the agricultural supply chain likely to be immune from the eyes of the ACCC.

Belinda Harvey is a special counsel based in our Sydney office.

Australia's new foreign investment regime

What does it mean for investment in the food and agribusiness sector?

Gary Thomas, Sarah Lilly and Lauren Poat

Australia's new foreign investment regime came into effect on December 1, 2015. As noted in previous editions of Cultivate (see editions 2, 3, 6 and 8), material changes to Australia's foreign investment rules as they apply to the agri sector have been foreshadowed for close to two years. Many of these foreshadowed changes have been implemented as part of the new regime. This article focuses on those changes.

Key changes – a snapshot

The key changes to the regime that relate to the agri sector include

- The introduction of a new definition of agricultural land (which replaces the old concept of “rural land”).
- The introduction and regulation of the new concept of agribusiness.
- Reductions in the thresholds that will trigger the need for a notification to Australia's Foreign Investment Review Board (FIRB) for agri transactions.
- The introduction of fees for notifications to FIRB.
- The introduction of an agricultural land register.

The new thresholds for agricultural land and agribusiness investments by *non foreign government* investors, in summary, are:

Investment	Monetary threshold	Percentage interest threshold	Fees
Agri land – land that is used, or could be used for a primary production business	US, NZ, Chile – A\$1,094m (indexed) Singapore, Thailand – A\$50m (not indexed) All others – A\$15m (cumulative)	Any interest	A\$5,000 – A\$100,000 ¹
Agribusiness – businesses that carry on business or derive earnings from certain industries including agri, forestry and fishing and certain food product manufacturing business	US, NZ, Chile – A\$1,094m (indexed) All others – A\$55m (indexed)	US, NZ, Chile – substantial interest (20%) All others – direct interest (usually >10%) ²	A\$25,000 – A\$100,000 ³

¹ A fee of A\$5,000 applies to land valued at or below A\$1m, and fees of between A\$10,000 - A\$100,000 will apply to land valued above A\$1m.

² A direct interest can be less than 10% in certain circumstances, including where the acquirer has an agreement relating to the entity or business being acquired or where the acquirer is in a position to participate in or influence the central management and control of, or influence participate or determine the policy of, the entity or business. Refer to FIRB Guidance Note 18 for further details.

³ A fee of A\$25,000 applies to agribusinesses valued at or below A\$1bn, and a fee of A\$100,000 applies to agribusinesses valued above A\$1bn.

All acquisitions by *foreign government* investors will have a A\$0 threshold.

These changes have been driven in part by the Australian government determining that it requires a deeper understanding of foreign investment in

the Australian agri sector. Consistent with this, the Australian government has also recently created an agricultural land register. Since February 29, 2016 all foreign investment in agricultural land must be registered with the Australian Taxation Office. The type of information collected for the register includes details such as location and size of the property, the interest being acquired and who the party acquiring it is. Consistent with this, the Australian government has released a consultation paper for the development of a national water interests register.

The increased understanding the Australian government will have of the Australian agribusiness sector will mean that it is in a better position to assess the potential ramifications of any particular proposed foreign investment in the sector. In particular, the Australian government will be in a better position to assess whether a proposed investment is in the national interest (noting that the investment of foreign capital into capital intensive industries such as agriculture is, in most cases, considered to be in Australia's national interest).

Agricultural land and Agribusiness – some details

Agricultural land is defined under the new regime as land that is used, or that could reasonably be used, for a primary production business. This includes land that is partially used for a primary production business, or land where only part of the land could reasonably be used for a primary production business.

The definition of a primary production business under the new regime is the same as that which applies under Australia's income tax laws. It includes cultivating or propagating plants, maintaining animals for the purposes of selling them or their produce (typical animal farming), manufacturing dairy produce, conducting operations

relating to catching fish and other water animals, pearl farming, and plantation operations (planting, tending, felling and transporting trees). An important consideration in determining whether a primary production business is being carried on is whether the agricultural activity has a commercial purpose or character.

Consideration must also be given to whether the land could reasonably be used for the purposes of carrying on a primary production business. Factors that will be considered in assessing this are the zoning of the land, the history of use of the land, the characteristics of the land and any applicable lease or licence conditions or limitations.

Agribusiness is a new concept introduced into the regime. It includes any Australian entity or business that uses its assets in the carrying on of a business wholly or partly⁴ in any of a number of specified classes of business set out in the Australian and New Zealand Standard Industrial Classification Codes. These classes include agriculture, forestry and fishery businesses and certain food product processing/manufacturing businesses (meat, poultry, milk and cream, fruit and vegetable and seafood processing, together with cheese and other dairy, oil and fat, grain mill product and sugar manufacturing). However, certain food product businesses are excluded from the definition of an agribusiness. These include cured meat and smallgoods manufacturing, ice-cream manufacturing, cereal, pasta and baking mix manufacturing, bakery product manufacturing, confectionery manufacturing and a number of other abstract food products including food coloring, herbs, coffee and frozen meals.

Investors should also note that the definitions of agricultural land

and agribusiness are not mutually exclusive. In many instances the acquisition of an agribusiness will involve the acquisition of an interest in agricultural land. In such cases, the acquisition of the interest in agricultural land may require notification to FIRB despite the value of the acquisition of the agribusiness being below the agribusiness monetary threshold. However, it will not always be the case that the acquisition of an agribusiness will include as part of it the acquisition of an interest in agricultural land – for example, food processing or manufacturing operations such as an abattoir may not be located on agricultural land.

A new fee regime has also been introduced, as noted in the above table. Substantial fees are now applicable to all relevant acquisitions in the agri sector. At the lower end, applications relating to acquisitions of agricultural land that are valued at A\$1 million or less will incur a fee of A\$5,000. However, acquisitions for agricultural land valued in excess of A\$1 million will incur fees between A\$10,000 and A\$100,000, depending on the value of the property. For agribusiness investments, a fee of A\$25,000 applies where the value of the acquisition is A\$1 billion or less, with the fee for acquisitions above this threshold jumping to A\$100,000.

Kidman decision

The S. Kidman and Co. property portfolio, Australia's largest private landholding, was offered for sale in 2015. The portfolio comprised 11 beef and associated properties across four states and territories covering more than 100,000 square kilometres. The portfolio included the world's largest cattle farm, Anna Creek (~23,500 square kilometers). The Anna Creek property is adjacent to and overlays the weapons testing site at the Woomera Protected Area (WPA).

⁴ At least 25% of the acquired business or entity must derive earnings from agribusiness or the value of the assets used for agribusiness must exceed 25% of the total value of the assets.

There was significant foreign interest in this opportunity, speculated to include investors from Canada and China. In November 2015 for only the fourth time in 20 years, the Treasurer (on the recommendation of FIRB) blocked the proposed sale in its original form on national interest grounds. Treasurer Scott Morrison said in a statement: “Given the size and significance of the total portfolio of Kidman properties along with the national security issues around access to the WPA, I have determined, after taking advice from FIRB ... that it would be contrary to Australia’s national interest for a foreign person to acquire S. Kidman and Co. in its current form”. Two things were clear from the Treasurer’s statement – that the size of the portfolio (not just its proximity to the WPA) was of concern, and that if the form of the transaction was changed then the Treasurer and FIRB might reach a different conclusion.

This decision followed shortly after the granting of a long term lease of the Port of Darwin by the Northern Territory government to a Chinese company allegedly linked to the People’s Liberation Army. As the port is infrastructure owned by an Australian state or territory, FIRB approval was not required for the Northern Territory government to enter into the lease. The port transaction therefore took both the Australian government and the US government by surprise (US troops regularly pass through the port). The Obama administration apparently heard of the transaction through reporting in the US press, and President Obama specifically raised his government’s surprise with Australia’s Prime Minister Malcolm Turnbull⁵.

Given this background, there are some who have suggested that the blockage of the Kidman transaction was made

for local and international political reasons, rather than due to genuine concerns for the national interest. However, the Treasurer’s position at that time was consistent with that taken by the previous Australian government in 2009, when Chinese SOE Minmetals was prohibited from acquiring parts of OZ Minerals because OZ’s Prominent Hill mine was located in the WPA.

The second round proposal selected by Kidman as its preferred bidder appeared to address the Treasurer’s national security and portfolio land area concerns regarding the proposed sale in its initial form. Dakang Australia Holdings (Chinese controlled) entered into a consortium arrangement with Australian Rural Capital in a bid crafted to assure an ongoing Australian ownership interest in the portfolio (20 per cent), the carve out of Anna Creek (and the Peake holding) from the portfolio, and significant investment in the asset which is expected to lead to increases in production and increased international markets. We understand that this restructuring of the offer was undertaken in consultation by all involved parties with FIRB as to what an acceptable deal structure would likely need to be – the Kidman chairman stated that “the Consortium and Kidman have complied with all requests by the FIRB...”.

Despite this, on April 29, 2016 the Australian Treasurer announced that his “preliminary view” was that the 2nd round proposal by the consortium was contrary to the national interest. In his announcement the Treasurer noted that a relevant consideration was ensuring the Australian public maintained confidence in the government’s regulation of foreign investment so that the public continued to support foreign investment, that the offering of the portfolio as an aggregated asset made it difficult

for Australian bidders to be able to make a competitive bid and for any single Australian group to acquire the entire operation, and that he is not yet satisfied that his concerns regarding the size of the portfolio have been addressed by the consortium’s proposal. The Treasurer gave the consortium a “natural justice period” of four days (spread over a weekend) to respond to his preliminary finding.

The Treasurer also noted that he had commissioned a former head of the Australian Competition and Consumer Commission (ACCC) to investigate the sale process, and he had found that the sale process was satisfactory and offered Australian parties an opportunity to make an offer but also that there was significant domestic interest in the business.

Some aspects of this latest decision by the Treasurer are noteworthy

- The Treasurer commissioning the report by the former head of the ACCC to assess market integrity issues around the sale process and to advise on whether the process offered a fair opportunity for Australian bidders to participate, together with the Treasurer stating that the size of the asset makes it difficult for an Australian enterprise to acquire the entire operation, suggests that the national interest test has a broader meaning than has previously been understood. In particular, it suggests that the national interest now requires that sale processes be structured in a manner that facilitates competitive Australian participation in such processes. Such a concept will likely prove challenging for future vendors. For example, when is the line crossed between an Australian bidder simply being outbid (noting that a number of Australian bidders

⁵ This has prompted the Australian government, from 31 March 2016, to tighten the rules around the disposal of key infrastructure owned by the Australian states and territories to foreign investors.

participated in the second round bid process for the Kidman portfolio), and a transaction being structured so as to deny an Australian bidder a reasonable opportunity to participate? Additionally, why should the fair opportunity test apply only to Australian bidders rather than bidders generally, and how do you balance the application of that test against the right of the vendor (who may well be Australian) to secure the best price it can for the asset it has developed?

- The Treasurer stating that a relevant consideration was ensuring that the Australian public maintained confidence in the government's regulation of foreign investment so that the public continued to support foreign investment. It is surprising that "public opinion" now appears to be a meaningful aspect of the national interest test. We expect that in most instances the national interest of Australia is best served by the government approving an appropriate transaction and clearly communicating to the public why that transaction was not contrary to the Australia's national interest rather than to reject proposals because they are perceived by the Australian public (which is largely uninformed about the details of them) not to be in the national interest.
- The Treasurer making a "preliminary" finding. This has never occurred previously. This new approach is not of itself a cause for concern – presumably bidders would welcome increased opportunities for consultation that may facilitate a proposed transaction being approved (provided that consultation does not cause undue delay in the process). But there has been some cynicism about the limited practical usefulness of a four

day natural justice period in all the circumstances of the transaction, the consortium and the asset.

The backdrop to this decision is that the government has called a federal election to be held in early July 2016. There has been speculation by commentators, and criticism from the Federal opposition, that the decision is politically motivated with an ear to the nervousness of the broader electorate regarding the sale of Australian land to foreign interests.

Takeaways

Agricultural land

The new definition of agricultural land incorporates land used for a primary production business together with land that could reasonably be used for a primary production business. Accordingly, foreign investors acquiring Australian land need to carefully consider all possible uses of the land they are acquiring in case the lower agricultural land thresholds apply. Foreign investors also need to consider the aggregate interests they hold in Australian agricultural land when considering new investments because the A\$15 million threshold applicable to agricultural land is a cumulative one.

Agribusiness

The new concept of agribusiness covers a wide range of farming and food product manufacturing businesses. Foreign investors need to be mindful that the monetary thresholds for notifying FIRB of a proposed investment in agribusinesses are lower than for investments in other types of Australian entities and businesses.

Fees and timing

The fees now payable for notifying FIRB of a proposed investment are material, and for larger transactions quite substantial. We have already seen that the fees can be onerous for consortia of foreign investors (as each consortium

member has to pay a separate fee), and so expect that this will be an area of ongoing scrutiny for investors and, as a result, the Australian government. We are also seeing delays in FIRB processing notifications as compared to what had previously been the norm – it will be interesting to see whether these delays become standard practice or fall away once FIRB and its staff become more familiar with the new regime and its intricacies.

Likely points of sensitivity

Foreign investment in Australian agriculture is focussed in the beef, wheat and dairy sectors. The Kidman decision shows that FIRB and the Australian government will look closely at the proposed acquisition by foreigners of very large tracts of Australian land in a particular geographic area, and particularly acquisitions of tracts of land that are adjacent to or overlap areas that are otherwise sensitive. These issues need to be carefully considered by potential acquirers in the Australian beef and wheat sectors. Further, the Australian dairy industry is likely to be considered by the Australian government to be an important and sensitive Australian industry. Accordingly, while the scale of dairy land holdings being offered for sale is less likely to raise concerns, if foreign interests are considering acquiring a key player in the Australian dairy industry or a majority of the dairy holdings in a geographic area they should expect that the proposal will come under close scrutiny by FIRB and the Treasurer.

Engage with FIRB

The first round of the Kidman process highlights how an adverse recommendation by FIRB and determination by the Treasurer can significantly impact a sale process. There are lessons in this for both vendors and bidders – to engage with

FIRB about the proposed structure of any significant transactions in advance, and where commercially viable to structure the offering and any bids in a manner more likely to be considered acceptable by FIRB and the Treasurer. As the Kidman experience demonstrates, there can be no guarantees of success through adopting this approach, but the advantages will be considerable if a satisfactory transaction structure can be submitted to FIRB. While FIRB will not give specific structuring advice, it has confirmed to us that it will consider hypothetical scenarios and give an indicative view as to whether the proposed action might or might not fall within the scope of the regime and thus require notification to FIRB. Accordingly, FIRB encourages transaction parties to liaise with it

in advance, particularly in relation to potentially sensitive or high value transactions. Interested parties should therefore carefully consider the potential advantages to opening an advance dialogue with FIRB.

National interest test

The national interest test under Australia's foreign investment regime was not amended as part of the regime rewrite, but continues to be a very relevant consideration for foreign investors. The test remains deliberately vague, so as to give the Australian government the flexibility to take steps to block or to impose conditions on proposed acquisitions by foreign investors as and when it considers appropriate and necessary to do so. The Treasurer's most recent announcement regarding the Kidman transaction

starkly highlights the flexibility this test provides the Australian government, and arguably constitutes an expansion of what falls within the scope of this test. Further, the novel aspects of the steps taken by the Treasurer, and his reasoning set out in that announcement, highlight the particular sensitivity to proposed acquisitions by foreign persons of large tracts of Australian agricultural land.

Gary Thomas, Sarah Lilly and Lauren Poat are based in our Perth office. Gary is a partner, Sarah is a special counsel and Lauren is a lawyer.

Food and agribusiness 2016

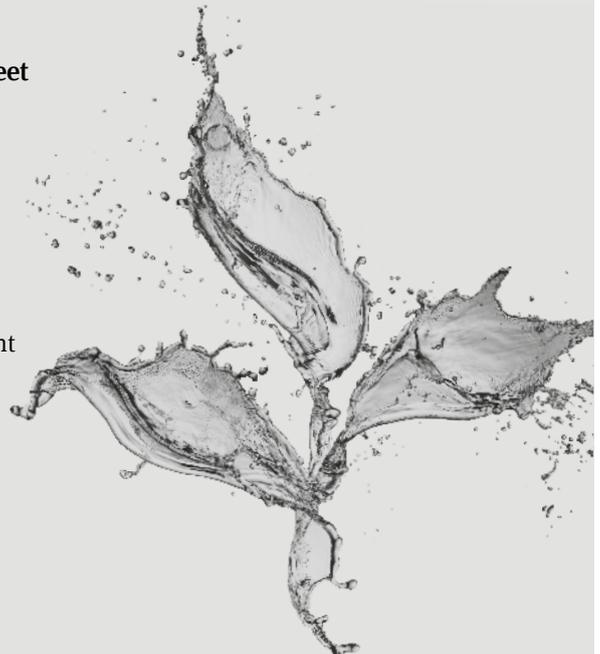
The future of precision agriculture

Farming is entering a new era of technological evolution to meet the challenges of the 21st century.

As precision agriculture technology becomes more advanced and accessible, and ensuring food security grows ever more critical, innovative farming practices are revolutionising agricultural production across numerous sectors and jurisdictions.

In order to better understand where this exciting industry is heading, the Food and Agribusiness group at Norton Rose Fulbright is undertaking a global survey entitled The Future of Precision Agriculture.

We want to capture the views of those actively engaged in the agribusiness sector. To participate in the survey, please contact Illakiya Vasanth – illakiya.vasanth@nortonrosefulbright.com



The UK's proposed soft drinks industry levy – headline-grabber or a sign of things to come?

Matthew Hodkin

On March 16, 2016, the UK Chancellor announced in his 2016 Budget a consultation on a new soft drinks industry levy to take effect from April 2018. Immediately, the press seized on the notion that the UK was to introduce a new “sugar tax” and much was made of this in the press coverage in the immediate aftermath of the Budget announcement.

However, much of the detail of the levy remains to be finalized; there is still scope for comments to be raised during the consultation over the summer of 2016 and so the detail is still very much subject to change. The actual levy will be introduced in the Finance Bill 2017. This article looks at the development of this kind of tax, its proposed contribution to the UK tax take and its overall potential effectiveness as well as the difficulties the UK Government will need to overcome in implementing the measure.

Proposed measures

Whilst the details are still relatively patchy, the public statements to date indicate that it is proposed that the levy will contain the following features

- The levy will be imposed on producers and importers of drinks.
- It will be assessed on the volume of the sugar-sweetened drinks produced or imported.
- The levy will be charged as follows
 - for drinks with a total sugar content up to 5 grams per 100 milliliters, the levy would not be charged

- for drinks with total sugar content above 5 grams per 100 milliliters, the levy would be charged at a basic rate
- for drinks with total sugar content above 8 grams per 100 milliliters, the levy would be charged at a higher rate.
- Pure fruit juices and milk-based drinks will be excluded from the levy. It has been confirmed that fruit juices with added sugar would be subject to the levy.

Rationale

The political rationale for the levy is, on its face, a simple one. As the Chancellor put it in his Budget speech

“Sugar consumption is a major factor in childhood obesity, and sugar-sweetened soft drinks are now the single biggest source of dietary sugar for children and teenagers. A single 330ml can of cola can contain more than a child’s daily recommended intake of added sugar. Public health experts have identified sugar-sweetened soft drinks of this kind as a major factor in the prevalence of childhood obesity.”

This statement is reflective of the growing focus in the press that added sugar may be causing as many of the problems in the public healthcare system as the previous bogeyman of saturated fat. We look below at what hurdles will need to be overcome to ensure the levy has the desired effect.

Unlike many other measures in the Budget, this levy is not projected to be a serious revenue-raiser for the UK government; in fact, some commentators are suggesting it may cost more to administer than it raises. The financial projections released as part of the Budget show that the UK Government intends to raise approximately £520 million in 2018/19 as a result of the levy (with this amount reducing slowly over the following three years to £455 million). In the same speech, the Chancellor suggested that the money raised would be used to fund various initiatives to support children’s sport and other measures aimed at the school age population. This does suggest that the Government has in mind a fixed amount of revenue that will arise from the levy.

Challenges for the levy

01 | Incidence of the levy

There is some debate over the question of who would bear the cost of the levy. Although it is the producers and importers of soft drinks who will have to account for the levy, there are concerns that, in some cases, the producer or importer may have to bear the cost of the levy, rather than the retailer or the ultimate consumer.

If this is the case, it would counter the desired effect of dissuading the public from buying a certain kind of soft drink.

02 | Level at which the levy is set

It is expected that the levy will be set at such a level as will raise £500 million in 2019/20. Research from the Institute of Fiscal Studies has suggested this implies a levy rate of 18 pence per litre for “main rate” drinks and 24 pence per litre for “higher rate” drinks.

This “stepped” profile is likely to create distortions in the market, in particular for products that are near the respective thresholds. We have seen in the past with such taxes as stamp duty land tax (which has recently removed such “steps”) and air passenger duty that it can create incentives for business to manipulate products and prices in unexpected ways.

03 | Dividing line between products

Similarly, a system that introduces a bright line between certain products that attract a tax and other similar products that do not will itself potentially create distortion. We have seen in the field of VAT long-running debates over the question of whether Jaffa Cakes or chocolate teacakes should bear VAT. If added sugar really is the target, why apply the tax to some drinks and not others?

04 | What if the levy achieves its aim?

One of the perennial troubles with introducing a levy to dissuade certain types of behaviour is that, if it is successful in its aim, the tax take is lower than expected. This is especially the case where there is a specific figure quoted as the expected amount to be raised. In the UK, the bank levy has suffered

from similar problems: designed to encourage banks to fund themselves on a long-term secure basis, the levy was successful and accordingly the rate had to be raised in order to preserve the expected tax take.

In this case, soft drink producers almost face a “game theory” challenge. If soft drinks producers reduce the sugar content of their drinks in advance of the levy applying, they may gain a competitive pricing advantage compared to their competitors. However, if the competitors also reduce the sugar content of their drinks, all soft drinks manufacturers will have reduced sugar content and the Government would be forced to raise the amount of the levy in order to ensure the expected revenue is maintained.

05 | Will the levy achieve its aim – the Danish experience?

There are a number of comparisons with the duty regime relating to saturated fats that was introduced in Denmark in 2011. This levy was abolished the following year amid complaints that its main effect was to harm Danish business on the basis that people simply bought their products from other EU countries such as Sweden and Germany. The duty was considered to be unwieldy and administratively difficult and the overall benefit to public health did not justify the downside.

Any UK soft drink levy is likely to face similar concerns and issues. We have seen in the past that, for example, the UK’s high tobacco duty has resulted in smokers making trips to France to restock in cigarettes.

Challenges to the levy

There has been some discussion as to whether the levy could be challenged if it made its way into legislation. Clearly, at present, whilst a public consultation is taking place, the appropriate means to effect changes to the regime would be to participate in that process. Otherwise, once the regime finds its way into UK primary legislation, a challenge to that becomes more difficult.

Generally speaking, primary legislation can only be challenged in the UK on the grounds that it constitutes unlawful state aid, that it is incompatible with certain principles set in the EU treaty or that it contravenes the UK’s Human Rights Act.

Needless to say, it is likely that, if the final version of the tax results in significant unfairness between almost equivalent products or businesses, it is more likely that they will look to find a way to challenge the legislation. The UK government is, however, well aware of the possible pitfalls in introducing new taxes of this sort and overturning primary taxing legislation has been historically difficult. It remains to be seen whether the soft drinks industry levy will be subject to such a challenge.

Conclusion

In 1764, the British Parliament passed the Sugar Act (more properly known as the American Revenue Act) which aimed to preserve the sugar industry in certain British colonies by increasing the duty on other imported sugar. This was one of the contributory factors to the unrest that led to the American Revolution. Although the soft drinks industry levy is already proving controversial, it is unlikely to have such long-term ramifications as the Sugar Act. Nonetheless, those parties interested in the implications of the levy would be well advised to participate in the consultation process.

Matthew Hodkin is a partner based in our London office.

Is the sun setting on the ranch? Canadian workplace legislation and the impact on farming operations

Bill Armstrong and Ruoxi Wang

Canadian farmers, ranchers and dairy producers have always valued being able to operate their businesses independently and relatively free of regulations. So, when the Government of Alberta recently enacted Bill 6 – Enhanced Protection for Farm and Ranch Workers Act (the “Act”), it led to extensive criticism and widespread protests on the steps of the provincial legislature by farmers and ranchers. At issue was the extent of intrusion on their way of life, including their ability to involve their children in their operations. The Act and accompanying regulations will result in the elimination of many long-standing exemptions granted to Alberta’s farms and ranches from workplace standards and obligations. The impending changes resulting from the controversial Act, while new to Alberta, are not new to farmers and ranchers in other Canadian provinces.

The Alberta Act

In Canada, there are four main legislative regimes that impact the standards of employment and workplace safety. Legislation related to employment standards establishes the minimum standards of employment, including hours of work, overtime, holidays, vacation and minimum wage. Labor relations legislation gives workers the right to unionize, participate in collective bargaining, and to strike under certain conditions. Workers’ compensation legislation provides for a type of no-fault disability insurance, where employers are responsible for paying a premium, so employees who are injured at work receive compensation for lost income, healthcare and other related costs. Occupational health and safety legislation establishes minimum workplace safety standards and obligations to minimize the occurrence of workplace accidents.

Prior to the Act, much of Alberta’s legislation governing employment standards, labor relations, workers’ compensation and occupational health and safety did not apply to farm and ranch workers. In late 2015, Alberta enacted the Act to “make farm work safer and bring Alberta in line with the protections that farm and ranch workers in other Canadian provinces enjoy”. As a result of the Act, Alberta’s farms and ranches will face a significant change in landscape. As of January 1, 2016, workers’ compensation coverage became mandatory for paid farm workers, excluding family members (“family member” is defined to include spouses, adult interdependent partners, children, parents, grandparents, siblings, aunts, uncles, nieces, nephews and first cousins). At the same time, basic standards under occupational health and safety came into effect for



paid workers while onsite. Meanwhile, changes to the employment standards and labor relations legislations are still being developed.

Under the changes to occupational health and safety legislation, farm and ranch workers can refuse unsafe work, and occupational health and safety officials can go on farms to investigate serious injuries and fatalities. Farming and ranching operations must familiarize themselves and ensure compliance with the extensive new obligations, the failure of which may result in stop-work orders, significant fines, and/or imprisonment. The Act excludes the application of occupational health and safety obligations from owners of a farm or ranch operation, family members of the owners, and friends and neighbors who volunteer their time on the farm or ranch. Detailed occupational health



*A crowd of farmers unhappy with Bill 6 gathered at the legislature for a rally
Copyright text : John Lucas, Edmonton Journal*

and safety standards specific to farms and ranches will come into effect over the next eighteen months.

Under the changes to workers' compensation legislation, workers' compensation coverage has become mandatory for all farm and ranch workers in Alberta, excluding family members and friends and neighbors who volunteer their time.

While the specific changes stemming from the Act are still being rolled out, interested parties have expressed extensive concern over the potential

effects of the Act. For instance, the Act struck out, in its entirety, the exclusion of farm and ranch workers from the requirements under employment standards legislation. This raises the concern that employment standards requirements will apply to farm workers indiscriminately, thus failing to take into account the sporadic nature of farming operations. Specifically, employment standards requirements relating to hours of work, overtime and mandatory breaks would interfere with the flexibility that is required to work longer days during seeding, harvest and calving seasons.

The current wording of the Act with regards to labor relations legislation suggests that farm and ranch workers will have the unfettered right to unionize, participate in collective bargaining, and potentially strike. Farm owners generally fear that such rights would significantly interfere with seasonal operations due to the time- and weather-sensitive nature of farming.

What are other Canadian provinces doing?

01 | Employment standards

In British Columbia, most sections of the employment standards legislation

and regulations apply to farm workers, with certain exceptions including hours of work, overtime and statutory holidays. While farm workers are not entitled to overtime pay, they must not work excessive hours detrimental to their health or safety.

In Saskatchewan, the minimum employment standards, such as hours of work, overtime, statutory holidays, vacations, required periods of rest and minimum wage do not apply to workers whose primary duties consist of actively engaging in farming, ranching or market gardening activities. However, those standards do apply to workers in egg hatcheries, greenhouses, nurseries, bush clearing operations and commercial hog operations. Further, family farms are exempt from minimum employment standards.

In Manitoba, some sections of the employment standards legislation apply to agricultural workers, while others do not. While agricultural workers are subject to employment standards requirements relating to minimum wage, termination notice, vacations, weekly day of rest, work breaks and restrictions on deductions from pay, they are not subject to requirements with regards to hours of work, overtime and general holidays. The employment standards legislation also differentiates between family members who work on the farm, and paid non-family workers, with family members exempt from almost all employment standards requirements.

In Ontario, there are different categories of agricultural workers covered by the employment standards legislation, each with their own set of exemptions or special rules. For instance, the “farm employee” category applies to employees whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, etc. Farm employees are exempt from provisions in the employment standards legislation

relating to minimum wage, hours of work, daily rest periods, time off between shifts, weekly/bi-weekly rest periods, overtime, public holidays and vacation with pay. However, they are covered by employment standards protections relating to regular payment of wages, leaves of absence, termination notice and/or termination pay, and severance pay.

Another category is “harvesters of fruit, vegetables or tobacco”. This category includes workers employed on a farm to harvest, or bring in, crops of fruit, vegetables or tobacco for marketing or storage. Workers under this category are exempt from some minimum requirements such as hours of work and overtime, but are subject to special rules with regards to public holidays, vacation with pay, and minimum wage. Harvesters are entitled to minimum wage, vacation pay and public holidays in some cases, while farm employees are not.

02 | Labour relations

Currently, eight provinces in Canada allow farm workers to unionize and participate in collective bargaining. In Manitoba, every employee has the right to be a member of a union, and to participate in the activities of a union. In Saskatchewan, employees have the right to organize in and to form, join or assist unions, and to engage in collective bargaining through a union of their own choosing. In British Columbia, every employee is free to be a member of a trade union and to participate in its lawful activities. No exemptions are allowed for farm workers in the labour relations legislations of those provinces.

In Ontario, the *Agricultural Employees Protection Act* allows agricultural workers to form associations but not unions. The Supreme Court of Canada, in a 2011 decision, upheld this legislation. As a result, agricultural workers in Ontario have the right to make representations to their employers through an employee’s

association respecting the terms and conditions of employment, but cannot force their employers to negotiate collective agreements.

03 | Occupational health and safety

In British Columbia, the occupational health and safety regulations require every workplace that employs workers, including farms, to have a mandatory health and safety program. This program must include the employer’s aims and responsibilities with respect to occupational health and safety, regular inspection schedules, written directions for employees, maintenance of statistics and records, and a regular review of occupational health and safety standards and their implementation. Only employers with twenty employees or more in a workplace that has a moderate to high risk of injury must develop and maintain an occupational health and safety program. Hence, smaller farming operations are subject to less onerous occupational health and safety obligations.

In Saskatchewan, the occupational health and safety legislation applies to all workplaces, including farms. Farm workers are given the same basic health and safety rights, including the right to know about the hazards of their jobs and how to deal with those hazards, the right to participate in health and safety education and training in the workplace, and the right to refuse work that they believe to be unusually dangerous.

Saskatchewan’s occupational health and safety legislation places responsibilities and obligations on everyone who works in a workplace, including employers, workers, self-employed individuals, contractors and suppliers. The level of responsibility for each of those groups is based on the extent of their authority and control over the workplace. For instance, the employer has the most control over the workplace, and thus has

the greatest responsibility to ensure that occupational health and safety standards are met.

In Manitoba, agricultural operations have been covered under the occupational health and safety legislation since 2009. Every employer must ensure the safety, health and welfare of all their workers. The legislation provides directions on how farm employers should protect their farmworkers, as well as how workers are required to protect themselves and others.

In Ontario, agricultural operations have been covered under the occupational health and safety legislation since 2006. The occupational health and safety legislation applies to all farming operations that have one or more paid workers – i.e. any person who provides labour on a farm in exchange for a wage, regardless of the person’s relationship to the farm. Unpaid workers and self-employed persons without any workers are exempt. Paid workers have the right to receive information on workplace hazards and toxic substances, receive instructions and supervision for farm equipment or hazardous locations, participate in identifying and resolving workplace health and safety concerns, and refuse or stop work that they believe is dangerous.

Ontario’s occupational health and safety legislation creates shared responsibility between employers and workers in creating and maintaining a safe workplace. For most cases in agriculture, the workplace is considered to be the farm property excluding any personal residence. Where an employer has six or more regularly employed workers, it must

prepare and post a written and signed health and safety policy, and must develop and maintain a program to implement the policy.

04 | Workers’ compensation

In British Columbia, the workers’ compensation legislation applies to all employers and workers engaged in paid work. All commercial farming operations are covered under the workers’ compensation regime, regardless of size. Certain workers may be exempted based on the duration of employment and whether employment takes place at a private residence. Employers who employ individuals for regular ongoing services around their homes for less than eight hours a week are exempt, but can purchase voluntary coverage. Employers who employ individuals for specific one-time projects around their homes for less than twenty-four total hours a week are exempt, but can also purchase voluntary coverage. Unpaid workers such as family members assisting with chores or seasonal activities are not included under the legislation.

In Saskatchewan, the workers’ compensation legislation contains exemptions for certain areas within the agricultural industry, such as dairy farming, feedlot or livestock yard operation, fur farms, grazing cooperatives, piggery farms and poultry farms.

In Manitoba, the workers’ compensation regime applies to all employers and workers in all industries, but allows for exemptions for family members engaged in farming activities on a family farm. Family members

include spouses, children, parents, siblings, and any other person whom the farmer considers to be “like a close relative”, whether or not related by blood, adoption, marriage or a common law relationship. This exemption is very liberal, as it exempts nearly any close friend, hence allowing family members and neighbors to work together on family farms without the mandatory requirement to obtain workers’ compensation coverage. Family farms may apply for voluntary coverage.

In Ontario, agricultural employers are required to provide workers’ compensation insurance coverage to their employees. An employee is anyone who provides labor on the farm in exchange for a wage. This includes all relatives and neighbors who receive a wage. Family members and neighbors who volunteer on the family farm are exempt.

As shown, the legislative regimes governing the standards of employment and workplace safety in the agricultural industry varies significantly from province to province in Canada. Although there appears to be no consistent minimum standard that is applicable across the provinces, agricultural workers are subject to certain exemptions from employment standards requirements in all the provinces. However, it remains to be seen, what the full impact of the legislation will be in each region.

Bill Armstrong and Ruoxi Wang are based in our Calgary office. Bill is a partner and Ruoxi is an associate.

After Milan Expo 2015: what's next for the food sector in Italy?

Chiara Bicci

Bringing over 21 million visitors to the city, Expo 2015 was one of the most important business events in the history of Milan. It also had the effect of drawing the public's attention to crucial issues for the food sector, such as sustainable agriculture and farming, safeguarding biodiversity, innovation in the agricultural sector, and education on food, nutrition and food safety.

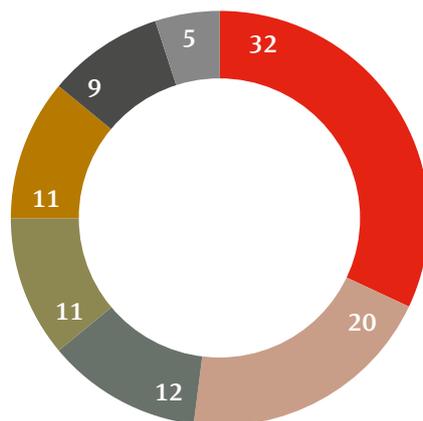
The conference has led to a renewed interest in the food and agriculture industry and an increase in the agricultural sector's activity, but with a technological and innovative angle.

Some of the key developments since the conference include:

New agro-tech start-ups

A recent development is the Future Food Institute initiative¹, which aims to collaborate with young entrepreneurs to seek new means of combining sustainable agriculture and technological innovation.

After the Expo, the Institute surveyed 350 new start-ups, which covering the majority of the agricultural sector's most innovative areas. Over a third of the start-ups operate in the agro-tech and sustainability fields (32 per cent), in addition to the companies involved in the agricultural sector's sharing economy (20 per cent), e-commerce and innovative means of distribution (12 per cent), safety and traceability (11 per cent), health protection (11 per cent), super foods (9 per cent) and retail (5 per cent).



The biotechnology market worldwide is worth an estimated €7 billion, of which approximately €4 billion is derived from the US. The size of the potential for growth of this sector is a source of inspiration for the fledgling Italian market.

New funding in the agriculture sector

The growth of innovative companies in the agricultural market has been accompanied by increased recognition from financial and public institutions, who appreciate the long term benefits of financing agricultural activities.

The Lombardy Region, who hosted the Expo with Unioncamere, has since launched "Start-up per Expo", which will provide €1.5 million in funding to 25 selected innovative start-up businesses.

Emilia Romagna has also announced a schedule of competitions for 2016, which are worth €1 billion. The competitions aim to further expand the region's food and agri-business sector, which increased three per cent in 2015 and now constitutes 20 per cent of the national total. This will be achieved through increasing exports and encouraging innovation in the region's supply chain of over 20,000 businesses.

At a national level, the Ministry of Agriculture and Forestry has established a private equity fund worth €20 million to guarantee loans to innovative businesses operating in the agri-business sector. This fund falls within an overall framework of government intervention, with €160 million assigned to the agri-business sector. The investments aim to create a generation of young agricultural entrepreneurs, who will exploit market opportunities, through subsidized or

¹ The Future Food Institute is a Bologna-based entity involved in studying the future of agriculture. The institute aims to "build a more equitable world, inspiring and empowering a new generation of creative and responsible food entrepreneurs".

interest-free loans of €60–80 million and tax credits, for the e-commerce activities of agro-business products.

“Investing in agriculture does not mean looking at the past, but using new tools to interpret the future.”

Maurizio Martina, Minister of Agriculture, Food and Forestry Policies.

In addition to these initiatives, the Ministry of Agriculture, Food and Forestry Policies and UniCredit have agreed to establish the “Cultivating the Future” project. This project provides €6 billion over a three-year period (2016–2018), to support investments and access to credit for agri-business enterprises, by promoting a program of training courses and through the development of innovative technological solutions.

UniCredit’s new Agribond will be launched in May which is dedicated to businesses in the agricultural supply

chain. The State guarantee provided by ISMEA, *Istituto di Servizi per il Mercato Agricolo Alimentare*, will permit initial disbursements of €300 million, which may be increased over time.

Innovation: the Human Technopole project

The partnership between the Ministry and UniCredit also leads to the creation of an Agri-Business School and a partnership with Cisco Systems Italy and Penelope S.p.A. This partnership will fund and implement technologically evolved programs for agri-business companies. The Agri-Business School aims to create sustainable financial plans, to circulate innovations and to reinforce exports, which remain the driving force of the industry.

These public initiatives to foster innovation in the sector also involve medical research. The recent Human Technopole project involves seven research centres and three “macro areas”, within which 1500 scientists and technicians will use genomics

and big data analytics to try to combat cancer and degenerative diseases, with special attention devoted to the effects of food on the development and the treatment of diseases. One of the “macro areas” will focus on nutrition genomics, investigating the effects of nutrition on the prevention of diseases, in order to develop new technologies to diagnose and treat degenerative diseases. The project is expected to cost €150 million per year and will require ongoing institutional funding. The Italian Human Technopole project will be unique worldwide, as it is the first to combine nutrition, genetics and big data.

All of these initiatives indicate a promising future for the Italian agri-business sector: a market where technology intersects with tradition.

Chiara Bicci is a senior associate in our Milan office.

Food and agribusiness Spotlight on Food Safety

Our global Spotlight on Food Safety webinar series is running throughout May and June 2016. The series features presenters from our international offices discussing a wide range of topics pertaining to key food safety developments around the world. The webinars can either be attended live via the web or subsequently viewed as recordings.

In this series, we will discuss:

- The First Amendment & FDA Restrictions on Commercial Speech (Texas, USA)
- Food safety in Australia – what you need to know (Melbourne, Australia)
- FSMA Implementation and the latest in GMO labelling (New York, USA)
- When does a regulatory inspection become an investigation? (Toronto, Canada)
- EU Food Regulation: Digesting the Risks and Rewards (London, UK)

For more information or to register for the webinar series, please contact Illakiya Vasanth – illakiya.vasanth@nortonrosefulbright.com



The race to produce Quinoa: opportunity knocks for grain farmers

Lisa Koch

The “super food” quinoa is big business. Many countries who are already the largest wheat exporters, including the US and Australia, are hoping to add quinoa to the list of grains which they can produce on a mass scale and export at a much higher price than wheat. Quinoa sells around \$2,500 a ton¹ compared to wheat which is under US\$200 a ton.²

Global demand

According to data from the UN Food and Agriculture Organisation, demand for quinoa has grown 300 per cent between 2007 and 2012. There appear to be two reasons for this increase in demand. Both relate to its health benefits; not surprising in an increasingly health conscious consumer society. The first is that it is the only food crop that contains all of the amino acids, trace elements and vitamins. The second is that quinoa is gluten-free. A 2013 Research and Markets report forecasts that the gluten-free market will be worth US\$6.2 billion by 2018 and is expected to grow at ten per cent a year.³

Possible global supply

Quinoa is traditionally grown in the Andean region due to the regional climate. Bolivia is the main exporter of the grain and Peru has seen a significant growth in exports. Peru's exports to UK grew 76 per cent in 2014, and by 2015 had increased to 47 per cent of all quinoa reaching the UK.⁴

Due to growing international demand, farmers are discovering new ways to develop the right seeds and farming techniques to mass produce quinoa in areas outside of South America. US farmers have been producing quinoa on a small scale since the 1980s but are now seeking to expand to large scale production. It is estimated that new varieties of quinoa will be developed within five years and these new varieties will be able to be grown in different regions of the US which will allow production to reach commercial levels. Australia is currently testing growing the crop in a hot, dry climate, with trials centred around Narrogin in the wheatbelt and Kununurra in the Ord River irrigation area. In addition to Australia and the US, there are over 50 other countries trying to produce quinoa commercially. Some countries have already prepared for the eventual mass scale production of quinoa. Bolivia for example is looking to establish a genetically unique brand “Quinoa Real” which will sell at a premium – a way to ensure it maintains its position as a dominant supplier.

Cautionary tale

However, quinoa is a cautionary tale about food security. According to the Guardian article *Can Vegans Stomach*

the Unpalatable Truth About Quinoa,⁵ countries such as Peru and Bolivia have been so focused on exporting the premium commodity that the price of quinoa has risen so costly that locals can no longer afford the grain that was once their nourishing staple food. Since this article, there have been many conflicting reports as to the true effect of the ramped up production of this commodity due to the high overseas demand.

Concerns have also been raised about the environmental effects of the transformation of quinoa from a subsistence crop to one that requires mass production. These include the possibility of overworking the land, the increased use of pesticides and the impact on livestock and wildlife.⁶

The future?

Since many countries are racing in the hope to mass produce this valuable commodity, the countries that are already producing quinoa are being squeezed to produce and export as much as possible. As a result, issues of local food security may be a reality for Peru and Bolivia. However, as long as quinoa continues to yield high returns, the race is still on for which country can produce and profit from this commodity.

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¹ Depending on how product is processed, as of April 4, 2016 according to <http://www.fairtrade.net/standards/price-and-premium-info.html>

² As of April 22, 2016 according to <http://www.indexmundi.com/commodities/?commodity=wheat>

³ <http://www.reuters.com/article/australia-quinoa-idUSL3N0TW05L20150225>

⁴ <http://www.cityam.com/234187/uk-quinoa-imports-surge-in-2015-as-waitrose-reports-sales-jump>

⁵ Article published in 2013, <http://www.theguardian.com/commentisfree/2013/jan/16/vegans-stomach-unpalatable-truth-quinoa>

⁶ <http://vegnews.com/articles/page.do?pageId=6345&catId=5>

Up in arms: understanding the French agricultural crisis

Janet Butterworth and Arnaud Lelievre

The question of what constitutes fair remuneration for farmers is a global topic and increasingly fraught as globalization and competition from producers in emerging markets continue to cat away the profits of traditional family farmers in developed markets.

In France, farmers and producers have taken to the streets to protest against the fall in prices for agricultural produce and declining incomes, in respect of which they are demanding a reassessment of the heavy burden of increasing environmental standards and high social charges, irrespective of the availability of State aids.

The agricultural industry is fraught with tension, even though the period for commercial negotiations between distributors and large industrials (during which an agreement is intended to be reached in relation to the setting of the price of agricultural produce) is drawing to a close.

An industrial sector in crisis

The crisis for French farmers has a number of causes

- Failing world prices and overproduction. The meat and milk markets have been particularly affected by overproduction, which results in failing prices worldwide. The excess of pigs is directly linked to Russian sanctions embargo in relation to European pork, which has closed an important commercial outlet. Overproduction is a global issue for the milk market. However its effects have been especially felt in Europe, in part because of

anticipation of an increase demand from China, which has gone unrealized as a result of China's economic slowdown.

- Liberalization of the economy. This increasing trend in Europe is having a significant impact on French agriculture, which has difficulty adjusting. French agricultural labour is 20 per cent to 50 per cent more expensive than the equivalent labor for its European neighbors and is affected by negative social dumping. Furthermore, imports at low prices are increasing, with other European countries receiving social benefits which are not available to French producers.
- Increasing burden of environmental standards. Although such standards are the same across Europe, they are applied in France in a more ad hoc way. The pork sector is a particular source of concern: with activities concentrated in Brittany, it is the focus of attention from environmental authorities.
- Health and safety crisis. There have been many such crises in the last few years, mainly concerning the meat sector. The most recent was the avian influenza outbreak, which erupted by the end of 2015,

affecting the entire poultry market. The sector expects a loss of 30 per cent of its income over the coming year.

- Indebtedness of French farmers and producers. Encouraged by the drop in interest rates since 2010, and advised by banks and other financial institutions, farmers and producers have been tempted take out loans to meet the huge costs of modernizing their equipment and growing their business. However, in times of crisis, as is currently the case with falling prices in international markets, many are no longer able to meet their repayment obligations and are finding themselves in serious financial difficulty.

It is an unprecedented crisis that has affected the French agricultural industry. According to the press, conditions have become so serious that attempted suicide is becoming common amongst French farmers.

Today, the main aims for the French farmers are a reduction in social charges and an increase in the sale price for agricultural produce, which according to press reports, had fallen below the cost of production by the end of 2015. It has been estimated that the price of agricultural raw materials in some cases accounts for just three per cent to five per cent of the final consumer price.

The retail price war carried out by supermarkets

The main cause for anger of French farmers involves the French Law on the Modernisation of the Economy (LME). With a liberal orientation, this law has been accused of having totally deregulated the negotiations between distributors and industrials regarding the fixing of agricultural prices. Worse still, it is argued that this law does not take into account the interests of producers, who are completely excluded from negotiations.

The key impact of the law includes

- Freedom of pricing between distributors and industrials: The LME law introduces freedom of negotiation between suppliers and supermarkets in order to set the price of agricultural products sold to final consumers prices.
- Loss of balance of power: In order to be able to buy more brands and become more competitive, the large supermarkets have grouped together around four central purchasing centres which share the distribution market. Faced with this, farmers and producers, through fear of losing business from large supermarkets, are not able to effectively negotiate prices.
- Result: An increase in the margins of distributors to the detriment of producers.

This situation is not new. Adjustments to the LME had been envisaged in 2013/2014, to include the renegotiation of clauses in contracts between farmers, processors and distributors. Those clauses were intended to take into account the increase in production costs, which are highly dependent on fluctuations in the commodities market.

Certain players in the crisis ridden agricultural sector have argued that the envisaged adjustments have not been respected by distributors.

Government responses

During the *Salon de l'Agriculture*, the French President François Hollande announced on February 27, 2016, that the LME will be reviewed, if no agreement is reached between distributors and producers at the closure of the current negotiations. The LME would in such case be amended before the summer, in order to obtain a better balance of power and ensure that farmers and producers are better paid. In particular, there has been a proposal to indicate the “producer price” on the final products.

In parallel, the French Prime Minister Manuel Valls has announced to the National Assembly, a reduction in social charges for all producers, along with a year without social charge contribution for low income farmers.

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Making the healthy choice easy

The EU Roadmap for Action on Food Product Improvement

Jan Jakob Peelen

The diet of many Europeans contains too much salt, saturated fats and sugars, mostly consumed from processed foods. At the same time most people do not consume enough fruits, vegetables and whole grain products.

On February 22, 2016, the Dutch EU presidency presented the *Roadmap for Action on Food Product Improvement* at the EU conference on Food Product Improvement in Amsterdam. The Roadmap contains agreements made between 22 EU member states¹, non-EU members Norway and Switzerland, non-governmental organizations and food business operators to take measures to improve food quality. It was agreed that the public and private sectors and non-governmental organizations will work together to reduce the levels of salt, saturated fats and added sugars in food.

The Roadmap emphasizes the need for public-private collaboration. National governments, food business operators, the European Commission, the WHO and non-governmental organizations should coordinate their action. As food and drink products are extensively traded across borders within the EU Single Market, food product improvement particularly requires cross-border cooperation. According to the Roadmap this should result in a better functioning of the EU internal market and could also encourage innovation by food business operators.

The Roadmap takes into account that small and medium-sized enterprises often lack the necessary resources or skills to work on food product improvement.

The Roadmap acknowledges that raising awareness, support and attention for small and medium-sized enterprises by sharing knowledge and best practices is important.

The Roadmap aims to make the healthy choice the easy choice for the consumer by improving the composition of food products. The improvement of food quality should result in a decrease of obesity and other diet-related diseases in Europe. To achieve these goals, the parties that have endorsed the Roadmap agreed

- To work in close multi-stakeholder collaboration at EU level on food product improvement, e.g. aiming for more focused discussions and public/private exchange of information on the matter of food product improvement.
- To improve scientific basis, monitoring and data collection and sharing at EU level on (improved) products, consumption and methods.
- To exchange best practices and facilitate implementation by companies.

These agreements and actions should contribute to a healthier choice being more easily available in the EU by December 31, 2020.

In his speech at the EU conference on Food Product Improvement, EU Commissioner for health and food safety Vytenis Andriukaitis said

“European countries already spend seven per cent of their health budgets on preventable obesity related diseases. This will not improve unless we address the risk factors for such diseases, in particular nutrition.”

One solution is to reduce salt, fat and sugar from our diets and this is where reformulation and innovation comes in. ... Clearly, we need a joined-up, consistent approach across Europe to reformulate food sold across our internal market.”

He also added that “To make healthy choice the easy choice, we need more than reformulation. ... I have in mind – taxation, marketing, advertising, education, reducing accessibility to unhealthy food, and awareness-raising.”

Dutch State Secretary for health, welfare and sports, Martijn van Dam, commented on the Roadmap, “Innovation is the key for the agricultural sector and food producers to produce healthier foods. Now that so many EU Member States and large food producers have come to an agreement, steps can be taken. It is important to work together on this, as citizens of the EU eat food products from all over Europe.”

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¹ The Czech Republic, France, Greece, Italy, Luxembourg and the UK have not (yet) endorsed the Roadmap

The battle between the European Union's competition and agricultural policies

Jay Modrall

In late 2015, a case before the European Court of Justice (the ECJ) addressed the tensions between the European Union's (EU's) Common Agricultural Policy (CAP) and EU competition policy. The CAP's objectives involve concerted action to stabilise prices and to adjust production to demand, which often conflicts with EU competition law principles. If a conflict occurs, the ECJ has long held that the CAP's objectives prevail over EU and national competition law. The most recent example of this is the 2003 Milk Marque decision.

The EU institutions have adopted a series of regulations and guidelines, which aim to reconcile EU competition law principles with the CAP. Council Regulation 1308/2013 established a common organization of the markets in agricultural products (the CMO Regulation). The regulation provides for general and special derogations, which allow EU farmers to cooperate in joint selling activities that might otherwise be prohibited. In December 2015, the European Commission adopted guidelines (the Guidelines) on the application of the specific derogations to the joint selling of olive oil, beef and veal and arable crops.

The Belgian endive case, raises the question of whether the derogations provided for in the CMO Regulation and discussed in the Guidelines are exclusive, or whether CAP objectives can excuse conduct that would otherwise violate EU competition law, even if the regulatory criteria for those derogations are not met. The case concerns a cartel of French producers of Belgian endives and will likely become the leading EU case on the interaction

between the EU's competition and agricultural policies.

This article briefly discusses the significance of the Belgian endives case and summarizes the Commission's Guidelines on the CMO Regulation.

EU agricultural policy and EU competition policy

The EU's agricultural policy and competition policy are enshrined in the EU's constitution, the Treaty on the Functioning of the European Union (TFEU); however, these policies are sometimes at cross-purposes. The CAP's objectives, set out in Article 39 TFEU, include the need "to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture", to "stabilize markets" and to "assure the availability of supplies" and "reasonable prices."

These concerted actions to increase growers' earnings, stabilise markets and ensure both available suppliers and reasonable prices, would normally violate the EU competition law

prohibition of restrictive agreements, concerted practices and abuses of dominant positions. However, the ECJ has long held that CAP objectives take precedence over competition law.

The ECJ has also said that agriculture is not a "competition-free zone". Articles 40 and 41 TFEU provide for the establishment of a common organization of agricultural markets and include rules on competition. Article 42 TFEU authorizes the EU Council and Parliament to determine the extent to which the EU competition rules apply to agricultural products. The Council and Parliament have done this through a series of regulations adopted in 1962, which have been repeatedly updated until the most recent CMO Regulation.

The Belgian endive case

The Belgian endive case originated in practices adopted by French producers of Belgian endive between January 1998 and March 2012, when two predecessors of the CMO Regulation were in effect. These practices included setting minimum prices and operating a mechanism to withdraw endives from the market as a form of price support.

The French competition authority imposed fines for violation of the EU competition rules, but the French Court of Appeal annulled the fine on the ground that EU competition rules did not apply to the price mechanisms implemented by the endive producers. However, the Court of Appeal was unclear as to whether these

mechanisms were permitted under the general derogations set out in the predecessors to the CMO Regulation, under the specific derogations or under a national regime that was in effect at the time.

On appeal, the European Commission took the unusual step of intervening before the French Supreme Court to challenge the Court of Appeal's approach. The ambiguity of the Court of Appeal decision led the Commission to review each of the possible grounds in detail. The Commission argued that the general derogations did not apply, in particular because the producers' price mechanisms were not necessary to achieve all of the CAP objectives, and these mechanisms related to price. The CMO Regulation's predecessors required prior Commission approval for the general derogation to apply, and the producers had never sought or obtained the Commission's approval. The Commission also argued that the predecessors of the specific derogations could not justify the price fixing mechanisms. This was because these mechanisms were not among the specific permitted conduct and producers could not extend the application of the specific derogations to other conduct by analogy. The Commission argued that setting minimum prices clearly exceeds the association of producer organizations (POs)' legitimate authority.

The French Supreme Court referred two questions, about the interaction between the EU competition rules and the CAP, to the European Court of Justice (the ECJ). The French court asked whether agreements and concerted practices that would otherwise be illegal under Article 101(1) TFEU could be permitted if they are "linked to" the responsibilities of producer organizations under the common organization of the market in accordance with the CAP,

even if they are not covered by any of the general derogations provided for in the predecessors of the CMO Regulation. If so, the French court asked whether producer organisations can fix minimum prices, coordinate on the quantities placed on the market or exchange strategic information, if these activities are aimed at the CAP objectives of stabilising producer prices and adjusting production to demand.

The European Commission and national competition authorities are expected to argue strongly before the ECJ that the derogations to the EU's competition rules set out in the CMO Regulation must be interpreted narrowly, and no exceptions from those competition rules outside the derogations set out in the CMO Regulation should be recognized. The ECJ's approach to these issues will create a precedent in this area. If the ECJ finds that the CAP's objectives can override the EU competition rules, even outside the relatively narrow scope of the CMO Regulation, then the case may lead to a period of enhanced cooperation and coordination among EU agricultural producers.

It is more likely that this case will confirm the central role of the CMO Regulation for producer organizations to avoid the EU competition rules and underline the importance of the new Guidelines. The CMO Regulation and the Guidelines are summarized below.

The Guidelines and the CMO Regulation

The CMO Regulation is long – 232 articles – and complex, covering all agricultural products listed in Annex I to the TFEU, except fishery and aquaculture products. The CMO Regulation contains detailed provisions on market interventions, aid schemes for various sectors, POs, associations of POs and so-called inter-branch organizations. These entities may collect and publish market data, forecast production and prices,

coordinate how products are placed on the market, explore potential export markets, and seek ways to restrict the use of animal health or plant protection products. The CMO Regulation also addresses competition rules and exceptional measures for market disturbances, animal diseases, health risks, specific problems, severe market imbalances and crisis reserves.

The CMO Regulation contains both general and sector-specific derogations from the competition rules.

General derogation

The general derogation covers all agricultural products within the scope of the CMO Regulation and all agricultural products exempt from the EU competition rules agreements, decisions and practices: (i) that relate to the production of or trade in agricultural products if they are necessary for the attainment of each of the CAP objectives (not only one or more of them); and (ii) of farmers, farmers' associations, associations of such associations, or recognised POs concerning the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products unless the CAP objectives are jeopardized.

The first part of the general derogation thus applies to a wider range of undertakings, but the conditions for its application are stricter than for the second part of the general derogation. Neither part of the general derogation applies to agreements, decisions and concerted practices that entail an obligation to charge an identical price or by which competition is excluded. Article 209(2) of the CMO Regulation states that no prior decision of the Commission or a national authority is required for the general derogation to apply. Application is based on self-assessment by the producers; however, a producer claiming the benefit of the general derogation must

be able to prove that the conditions for application of the general derogation are satisfied.

Specific derogation

The specific derogations relate to three sectors: olive oil, beef and veal and certain arable crops. These derogations permit POs to negotiate contracts for the supply of relevant products and to engage in related activities without being caught by the EU's generally applicable competition rules, subject to complex conditions. The Guidelines explain that these objectives must be achieved by generating significant efficiencies through the integration of activities in POs, so that the POs' activities will contribute to the fulfilment of the CAP objectives, including the pursuit of an effective commercialization strategy. The Guidelines discuss the type of activities that can create the significant efficiencies required to benefit from the derogation. The Guidelines also give specific examples of situations in which such activities can create significant efficiencies.

A number of conditions must be satisfied for the specific derogations to apply while POs are negotiating supply contracts on members' behalf

- The PO must be formally recognized by national authorities.
- The PO must pursue one or more of the objectives of concentrating supply, placing members' products on the market or optimizing production costs.
- The integration of activities must generate significant efficiencies so that the PO's activities contribute to the CAP objectives, as determined using one of two methods: a simplified method provided by the legislator or an alternative case-by-case assessment.

- The volume of a given product subject to negotiations by a particular PO must not exceed 20 per cent of the total national production for olive oil and 15 per cent of the for arable crops and beef and veal. The Guidelines give instructions on how to calculate the volumes marketed by farmers' organizations and how to check that they do not exceed the thresholds, which take into account natural variations over time. The Guidelines also explain how exceptional circumstances, like a natural disaster, can be taken into account when calculating these volumes.
- Producers cannot be members of more than one PO negotiating supply contracts on their behalf, although producers can sell their products both through a PO and directly to the market.
- The PO must notify the volume of products covered by the negotiations to the competent national authorities.

The CMO Regulation also includes a safeguard clause authorizing competition authorities to decide that an individual negotiation should be reopened or should not take place. The Guidelines clarify the situations in which the authorities may apply the safeguard clause.

Compared to the general derogation, the specific derogations have a narrower scope, as they apply only to contract systems and related activities for olive oil, beef and veal and certain arable crops. They also only apply to the activities of POs. They do not apply to inter-branch organizations or other undertakings who may benefit from the general derogation. However, the conditions to apply the specific derogations may be easier to meet, and the assessment methods and notifications give POs greater certainty.

Conclusion

The complex competition rules applicable to European producers are unfamiliar to many competition lawyers. These rules are a unique blend of familiar, generally applicable competition rules and sector-specific derogations applying to the agricultural sector as a whole or to limited parts of the agricultural sector.

The objectives of the CAP, including enhancing producer earnings while ensuring supply and reasonable prices for consumers, can conflict with the (almost) equally critical EU objectives of protecting competition through the EU's competition rules. The Belgian endive case, which seems likely to create the leading competition law precedent in the agriculture sector for years to come, combined with the recent CMO Regulation and adoption of the Guidelines, are timely reminders of the need to balance these essential but competing objectives.

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Food safety

Cori Goldberg and Krishna Kavi

FDA issues final implementing rule

The 7th and final Food Safety Modernization Act (FSMA) implementing rule is finally here and most companies will have three years to comply. On May 26, 2016, the FDA finalized the Mitigation Strategies to Protect Food Against Intentional Adulteration rule. The effective date of the rule is May 27, 2016, the date of the rule's publication in the Federal Register. The rule implements the "food defense" provisions of the FSMA and aims to protect the public health from intentional adulteration acts, such as acts of terrorism targeting the food supply.

The proposed rule was issued in December 2013 and the final rule primarily provides more information to stakeholders and greater flexibility for facilities in how they can mitigate these risks. The rule does not focus on specific foods or hazards but instead the rule mandates risk-reducing strategies for processes in certain food facilities.

The rule applies to domestic and foreign companies that are required to register with the FDA as food facilities under the Food, Drug, and Cosmetic Act (FDCA). Primarily, the rule is targeted at large companies whose products reach many people, while smaller companies may be exempt. Also, the rule does not cover farms. The FDA estimated that there are 3,400 covered firms under the rule that operate 9,800 food facilities.

The FDA is providing a longer timeline than expected for facilities to comply with the final rule. Very small businesses will have to comply with

modified requirements within five years after the publication of the final rule. Small businesses will have to comply four years after the publication of the final rule. Finally, all other businesses will have to comply three years after the publication of the final rule. Facilities should begin to determine if they are exempt from the rule's requirements or have to meet modified requirements. While the deadlines are a few years away, affected facilities should begin efforts now to ensure that all of the rule's requirements are met by the compliance start date.

Exemptions from the final rule include

- A very small business. These businesses would still be required to provide to FDA, upon request, documentation to demonstrate that the business is very small.
- The holding of food, except the holding of food in liquid storage tanks.
- Activities that fall within the definition of "farm".
- On-farm manufacturing, processing, packing, or holding by a small or very small business of certain foods identified as having low-risk production practices. The exemption applies if such activities are the only activities conducted by the business subject to the rule. These foods include certain types of eggs, and certain types of game meats.
- Manufacturing, processing, packing, or holding of food for animals.

- The packing, re-packing, labeling, or re-labeling of food where the container that directly contacts the food remains intact.
- Alcoholic beverages under certain conditions.

Key provisions of the final rule include

- Covered facilities must prepare and implement a food defense plan. The written plan must identify vulnerabilities and actionable process steps, mitigation strategies, and procedures for food defense monitoring, corrective actions and verification. A re-analysis of the plan is required every three years or when certain criteria are met, such as improperly implemented mitigation strategies.
- A vulnerability assessment must be conducted and this includes the identification of vulnerabilities and actionable process steps for each type of food manufactured, processed, packed or held at the food facility.
- For each point or procedure in the facility's process, the vulnerability assessment must evaluate the severity and scale of the potential impact on public health, the degree of physical access to the product, and the ability to successfully contaminate the product.
- Mitigation strategies should also be identified and implemented at each process step to ensure that

risks are minimized. The final rule clarified that a mitigation strategy applied in a direct and appropriate way to protect an actionable process step from an insider attack would sufficiently minimize the risk of intentional adulteration.

- Facilities must require that personnel in certain vulnerable areas receive appropriate training.
- Facilities must maintain records for food defense monitoring, corrective actions, and verification activities.
- Facilities must ensure the proper implementation of each mitigation strategy and the final rule gives facilities flexibility to establish these actions in the way most appropriate to their operation and product.
- Facilities must establish and implement procedures for monitoring the mitigation strategies.
- Facilities need to have corrective actions in place if mitigation strategies are not properly implemented.
- Covered entities must have verification activities to ensure that monitoring is being conducted and appropriate corrective action decisions are being made.

Due to the novelty of the rule, the FDA is providing education and outreach tools to affected food facilities. The FDA established an Intentional Adulteration Subcommittee with the Food Safety Preventive Controls Alliance to develop food defense training resources for industry and regulators alike. Additionally, the FDA intends to publish guidance documents to provide information about the final rule requirements, such as conducting a vulnerability assessment, identifying and implementing mitigation strategies, and writing procedures for food defense monitoring, corrective actions, and verification. The Mitigation Strategies Database is also available for covered facilities and provides a searchable list of mitigation strategies that can be used during different times in a food operation to mitigate intentional adulteration risks. Lastly, the FDA FSMA Food Safety Technical Assistance Network is a central source of information to help the industry understand and implement FSMA.

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Food safety

David McIndoe

Australia – States and territories agree to country of origin food labelling reforms

Australia's country of origin labelling system for food products is to be overhauled following agreement by State and Territory Ministers for Consumer Affairs. Food offered for retail sale in Australia will be required to be labelled more clearly to inform consumers of the product's origins.

Under the changes, foods of Australian origin will be identified by a kangaroo logo and a description of whether the food was grown, produced or made in Australia. Products can be labelled as "grown in" or "produced in" Australia where the ingredients are Australian and major processing occurred in Australia. A "Made in Australia" label can be used where products underwent major processing in Australia, as distinct from minor processing such as freezing or bottling. An optional "Packed in Australia" label may also be used, but cannot be accompanied by the kangaroo logo where the product is not of Australian origin.

The new system allows for a variety of standard phrases to reflect the degree to which the product is of Australian origin. Examples of permitted phrases include "Made in Australia from less than 10 per cent Australian ingredients", "Grown in France, Packed in Australia" and "Australian Macadamias (shelled in Fiji)". Manufacturers will be provided with some flexibility as to the design of the labelling, with a style guide and

online-self assessment tool currently being developed.

The changes also introduce a requirement that products must be labelled with a bar chart depicting the percentage of Australian ingredients used in the manufacture of the product. Non-priority foods (such as confectionery, biscuits, soft drinks and alcoholic beverages) and wholly imported foods must be labelled with a written statement of origin, but will not need to include a bar chart and will be subject to less stringent label design requirements.

These changes will be imposed by a new Information Standard under the Australian Consumer Law. The current country of origin provisions, found in the Australia New Zealand Food Standards Code, are set to be revoked.

The new labelling regime will commence on July 1, 2016, although businesses will be given two years to comply with the new requirements. The Australian Competition and Consumer Commission has been provided with additional funding over five years to ensure compliance with the new standards.

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Food safety

Cori Annapolen Goldberg and Krishna Kavi

FDA finally unveils new nutrition facts label

Added Sugars are in. Calories From Fat are out. And would the typical American eat the package of food in one sitting? If so, those Americans will now know from the label what they will consume in that sitting.

On May 20, 2016, the FDA finalized a new Nutrition Facts label for packaged foods that incorporates recent scientific information with the aim of helping consumers make better informed food choices. It is based upon the proposed updates to the Nutrition Facts label that were recommended in 2014 by First Lady Michelle Obama and then-FDA Commissioner Margaret Hamburg. These labelling changes are part of the First Lady's Let's Move campaign.

The FDA has made clear that it based its changes to the Nutrition Facts label on new scientific information, updated nutrition and public health research, recent dietary recommendations from expert groups, and public input. Critics argue, however, that the changes are not based on science and will cause companies to incur unnecessary costs.

The rule affects domestic food manufacturers and imported food manufacturers. Manufacturers have two years to comply with the final requirements. Manufacturers with less than \$10 million in annual food sales will have an additional year to make changes to their Nutrition Facts labels. Food manufacturers should begin

preparing to make the required changes to their food packaging to avoid any non-compliance with the rule. Key changes to the Nutrition Facts label include:

- Manufacturers must declare the actual amount and the percent Daily Value of vitamin D, calcium, iron, and potassium. Manufacturers can voluntarily declare the gram amount for other vitamins and minerals.
- The definition of Daily Value on the food labels is changed to “*The % Daily Value tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.”
- Daily values for nutrients such as sodium, dietary fiber, and vitamin D will be updated based on scientific evidence from the Institute of Medicine and other reports such as the 2015 Dietary Guidelines Advisory Committee Report, which was used in developing the 2015-2020 Dietary Guidelines for Americans.
- “Added sugars” must be disclosed on the label in both grams and as percent Daily Value in an effort to help consumers meet nutrient needs while staying within calorie limits.
- The “Calories from Fat” section will no longer be required.

- The serving size is going to be updated based on what people are actually consuming in a typical serving. This amount has changed since the original requirements were published in 1993. For example, the reference amount used to set a serving of ice cream was previously ½ cup but is changing to ⅔ cup. The reference amount used to set a serving of soda is changing from 8 ounces to 12 ounces.
- For food packages that are between one and two servings and that are typically consumed in one sitting, the calories and nutrients will be required to be labelled as one serving.
- For products that are not typically consumed in one sitting, manufacturers will have to provide “dual column” labels that indicate the amount of calories and nutrients consumed per serving as well as per package. For example, a 24-ounce bottle of soda would need dual-column labels.

In addition to the substantive changes noted above, there are formatting changes that will be required for the labels such as larger size font for the total calories and serving size sections.

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