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Cultivate

Food and agribusiness newsletter

Issue 14 | December 2017

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Cultivate

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

Cultivate
Published by Norton Rose Fulbright – December 2017 – Issue 14
Editor – Kathy Krug
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Editorial

With the world's population projected to reach 9.5 billion by 2050, and climate change continuing to exert pressure on our food production capability, the pressing challenges of feeding the world will become ever more pressing.

The key to solving this challenge lies in better utilization of science and technology. Crucially, this means better implementation of sustainability principles in agriculture aimed at increasing production on existing agriculture land in a way which reduces the environmental impact yet ensures economic profitability for future generations of producers.

A quantum shift in the way we consume, produce, finance and distribute food is underway. In these pages we review some of the opportunities and challenges this shift presents and the innovative new approaches being implemented in the process.

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Calendar

December

Dubai, UAE, December 5 2017

IPM – Dubai 2017

Casablanca, Morocco, December 8 2017

Morocco FoodExpo 2017

Pune, India, December 13, 2017

KISAN – India's largest agri show

January

Bangkok, Thailand January 24-26, 2018

2018 International Conference on Agriculture, Food and Biotechnology (ICAFB 2018)

Sydney, Australia, January 29 – 30, 2018

The ICFSPT 2018: 20th International Conference on Food Safety and Packaging

February

Melbourne, Australia, February 1 2, 2018

International Conference on Agriculture and Biotechnology

Abu Dhabi, UAE, February 5-6, 2018

Global Forum for Innovation in Agriculture

March

Paris, France, March 5 7, 2018

4th World Congress on Agriculture and Horticulture AgriWorld 2018

Tokyo, Japan, March 5-8, 2018

The Global Food Safety Conference

Berlin, Germany, March 8-10, 2018

21st Euro-Global Summit on Food and Beverages

The Paris Agreement and COP23: opportunities for the land sector

Elisa de Wit and Amy Quinton

The 23rd session of the Conference of the Parties (COP23) which took place in Bonn in November 2017 represented a significant breakthrough in the management of land sector emissions worldwide, with the agreement to develop a unified approach in relation to issues pertaining to climate change and agriculture,

In this article, we examine the background leading up to this decision, some of the key areas for consideration and the significance of this from the perspective of reducing global carbon emissions.

Emissions and the land sector

The land sector is uniquely positioned to contribute to climate change mitigation as it is 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, which was agreed at 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 both reducing emissions and providing a sink to offset those emissions which ultimately cannot be removed from the atmosphere.

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

However, total emissions from the land sector are in fact 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 in total the land sector currently accounts for 24 percent of global emissions, the second largest contributor after the energy sector.

Although it has been known for many years that these totals were a serious concern which would require a cohesive approach to achieve any meaningful reductions, until recently little progress has been made in relation to this. Consequently, the agreement arising from COP23 is an unprecedented step forward.

Addressing the challenge

Fiji, as the presiding country for COP23, emphasized the promotion of sustainable agriculture as a priority for COP23. There are a number of ways in which this can be achieved.

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

- 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.
- 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).
- 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.
- 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 assist to achieve high levels of carbon sequestration.

Reduction mechanisms already in place

While this is the first time the parties have agreed to implement a cohesive approach to the specific issue of land sector emissions, there are already mechanisms in place to address aspects of these issues, in particular in relation to land use and forestry under pre-existing protocols.

Land use and forestry in the UNFCCC

The UNFCCC 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 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 which result 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).

Case study: Australia

The current centerpiece 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.

About 53 per cent of ERF projects to date have been undertaken in the land and agricultural sector. These projects are jointly responsible for around half of the greenhouse gas abatement realized under the scheme so far, contributing to about 22.4 million tonnes of a total of almost 41 million tonnes of carbon dioxide equivalent achieved to date.

There are a number of methods available to landholders for sequestering carbon in vegetation and soil. The methods prescribed vary and include:

- The implementation of management regimes under which previously-cleared land naturally regenerates to a forest state.
- The planting of native vegetation.
- The protection of native vegetation, which would have otherwise been cleared for agricultural uses.

The more recent vegetation method, approved in August 2017, applies to plantation forestry. This method aims to increase carbon sequestration through new plantation forests and increase sequestration in existing plantations by shifting from short-rotation plantation forests to long-rotation plantation forests.

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 broad scale clearing will be preserved in a forest state under the ERF for 100 years. The number of registered soil sequestration projects is growing steadily. However, as yet, no carbon credits have been issued for these projects.

The ERF also includes a number of methods for reducing emissions from ruminants, although only a handful of projects have been registered under these methods to date. The only agricultural projects to be issued carbon credits so far relate to piggeries and 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.

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.

Now, the focus is turning to the Sustainable Development Mechanism (SDM). The SDM will be implemented through Article 6.4 of the Paris Agreement and will start after 2020. The inclusion of offsets from the land sector in the SDM is an important topic for consideration and debate at COP23.

Nationally determined contributions

In the lead up to COP21, parties were required to submit ‘nationally determined contributions’ (NDCs) to communicate the steps they intended to take domestically in addressing climate change.

While the land sector has traditionally been underrepresented in UNFCCC negotiations, there was an increasing focus on the land and agricultural sectors’ contribution to achieving NDCs in the lead up to and post COP21,

Over 80 percent of NDCs make commitments concerning forests and sustainable agriculture. 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 meters. Several NDCs commit to reducing emissions from agricultural activities, including Kenya, Costa Rica, Vietnam and Brazil. Brazil’s NDC promises to restore 15 million hectares of degraded pasturelands by 2030 and enhance 5 million hectares of integrated cropland-livestock-forestry systems by 2030.

Most NDCs of developing countries in relation to forests and agriculture are contingent on receiving financial and technical support. Financing NDCs, including under the Green Climate Fund and other sources, was also an important topic of discussion for parties at COP23.

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

The Paris Agreement

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

REDD

The Agreement includes provisions relating to REDD. Article 5 states:

“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.

At COP22 in Marrakesh, the first COP after the Paris Agreement took effect; parties considered whether future cooperative mechanisms implemented under Article 6 of the Paris Agreement should also cover REDD activities. It is hoped that further negotiations at COP23 will provide the detail on how REDD will be implemented under the Paris Agreement.

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. Article 6 has been a strong focus of negotiations in the lead up to COP23, as parties consider the rulebook and details for building global carbon markets. Parties began to discuss the frameworks for international markets at COP22 in Marrakesh; however limited progress was made on the technical detail.

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. Allowing offsets from the land sector to be recognized in the SDM and in bilateral and regional carbon markets will greatly enhance the land sectors’ involvement in emissions reduction efforts.



The final rules will need to be agreed before COP24 in Poland in 2018. As the details of an international trading scheme are negotiated at COP23, 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.

Focusing on the future

COP23 concluded with an agreement to collaborate on the implementation of solutions to a number of issues pertaining to climate change and agriculture, and to streamline two separate technical discussions on this topic into one process.

The parties now have until 31 March 2018 to submit their views on what should be included in the process, which will be likely to include livestock management systems, fertility and soil carbon, and assessment of adaptation and resilience.

Another key topic of consideration and debate relevant to the land sector will be the inclusion of offsets from the land sector under the SDM and in bilateral and regional carbon markets. Given that many NDCs in relation to forestry and sustainable agriculture are contingent on financial assistance, establishing effective frameworks for financing will also be of central importance to opportunities for the land sector in less developed and developing countries.

A case study of Australia's domestic climate change policy illustrates how market mechanisms can effectively incentivize 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 will be closely watched as future UNFCCC negotiations take place and the detail underlying these provisions is developed.

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.

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 get closer to implementation.

Elisa de Wit is a partner and Amy Quinton is a lawyer in our Melbourne office.

How the agricultural industry can harvest the benefits of blockchain technology

Catherine Simard and Pierre-Francois Tétreault

The blockchain revolution is coming. Start-ups, Fortune 500 companies and governments alike are all experimenting with the promising technology. Although it is better known as the data structure on which Bitcoin is built, blockchain's potential uses extend far beyond cryptocurrency. The technology's ability to instantly record, validate and share vast amounts of data could be a real game changer for many industries. This is especially true in the agricultural sector where the technology could be used to improve food traceability, supply chain management and payment options.

What is blockchain?

At its core, blockchain is an electronic system that allows for record-keeping of transactions in real time. When participants in a blockchain system complete a transaction, the time, date, nature and cost of the exchange is recorded. Once the parties have confirmed the accuracy of the information, it is then permanently and indelibly recorded, and can be made accessible to every other participant in the system. Blockchain technology therefore instantaneously creates a "consolidated record that constitutes a single and shared version of the truth."³

Improved informational transparency and accuracy increases trust between parties, reduces costs and boosts efficiency. Thanks to these benefits, blockchain technology could be the key to modernizing agricultural commerce.

How blockchain could change agri-business

Food traceability

More than ever, consumers are taking an interest in the origins and contents of their food. Demand for organic products, sustainably raised meat and locally farmed produce has grown substantially in the past few years. But when shoppers throw an item in their basket, can they trust the label to tell them what they're really getting? The evolution in consumer tastes has given rise to an important food fraud industry. Producers can easily sell mislabeled products, because the retailer or final buyer has no real way of verifying a product's origin.

Enter blockchain. Given the fact that it can record unalterable information at every step in the food supply chain, blockchain technology can provide reliable information regarding the origins of food items and the exact journey it took from farm to table. It could enable consumers to verify from which certified farm their strawberries

were picked from or in which field their grass-fed beef was raised with a single screen tap.

British company Provenance has successfully experimented with this type of application. Through the use of blockchain technology, the Provenance app successfully tracked sustainably-fished tuna from fishermen's boats in Indonesia to restaurants in Japan. The fish were tagged and entered into a blockchain system after they were caught. Subsequently, a new entry was made every time the fish changed hands, allowing the final buyer to know exactly where the fish came from. And this is just the beginning. Apps like Provenance have the potential to allow consumers to trace not only the origin of a single piece of meat or vegetable, but of every ingredient contained in a product.

Optimizing the supply chain

In addition to helping consumers make informed purchases, the improved supply chain transparency could also greatly benefit farmers. The agricultural sector's supply chain is notoriously complex and opaque, as shipments change hands multiple times before reaching their final destination. It is difficult for farmers to know where, for what price and how much of their products are ultimately sold. This lack of information leaves them vulnerable, and at the mercy of traders who can dictate order prices and quantities.

Blockchain technology can help rectify this imbalance by recording transactions in real time and providing up-to-date supply and demand

³ Norton Rose Fulbright, *Unlocking the blockchain: A global legal and regulatory guide*, Chapter 1: An introduction to blockchain technologies, online: <http://www.nortonrosefulbright.com/files/unlocking-the-blockchain-chapter-1-141574.pdf>.



information to participants. Having access to such information could allow farmers to properly set their own prices and optimize the quantities of products they put out on the market. Moreover, by keeping an ongoing record of participants' transaction histories, blockchain can make it much easier for parties all over the world to due diligence each other and confidently conclude transactions without the need for middlemen and agents.

Better pricing and payment options

Finally, blockchain technology can provide lower cost and faster payment options to agri-commerce participants. In the current system, it often takes weeks for farmers to get paid for their goods, and traditional payment options such as wire transfers can be quite costly. Blockchain can address some of these inefficiencies. Many developers have already designed blockchain-based apps that provide for cheap, secure and near-instantaneous peer-to-peer fund transfers. Some are even making use of "smart contracts" that trigger payments automatically as soon as the fulfillment of a certain condition (e.g. delivery of goods) is confirmed by the buyer. Recently, an Australian farmer became the first person to settle an agricultural transaction using this type of technology and more will surely follow in his footsteps.

The legal issues

As promising as blockchain technology is, there are still many legal hurdles to clear before it can really fulfill its potential. Below are only a few examples of issues that still need to be addressed.

Governance

Currently, there is no established governance system regulating blockchain transactions. Participants in restricted systems can establish their own ad hoc private rules on a contractual basis, but there are no overarching regulations. While this may work on a smaller scale, bigger commercial players may be reticent to exchange value over blockchain technology until more uniform, industry-wide governance parameters are established.

Contractual certainty

Electronic transactions and smart contracts are extremely convenient, but without formal agreements that businesses are used to dealing with, they could give rise to uncertainty about when contracts are formed, what terms they contain and whether they really exist at all. At this point, it is difficult to determine how courts will interpret contracts concluded using blockchain technology.

Privacy

Data added to the blockchain is stored permanently. This could cause issues when such data includes users' personal and banking information. Before blockchain gains widespread acceptance, privacy safeguards will need to be established and tested.

Conclusion

Blockchain has enormous potential to significantly impact the way agricultural business is done. Blockchain technology can increase trust between parties, facilitate information sharing throughout the supply chain and significantly reduce agricultural transaction costs.

As the public and private sectors work toward addressing the practical and legal challenges facing the technology, blockchain seems poised to be the disruptive force that propels the agricultural industry into the 21st century.

Catherine Simard is an associate and Pierre-Francois Tétreault is an articling student in our Montréal office.

The challenges of insuring against climate risk in Australia and the future sustainability of the agribusiness industry

Mairead Cusack

Climate change

The World Economic Forum has now identified the failure of climate change mitigation and adaption as the most impactful global risk over the next ten years. In 2008, the Garnaut Climate Change Review identified Australia as being particularly exposed to its physical risks. Some might argue these are already being felt: the 2009 heat wave in South Australia; the 2009 Victorian Black Saturday bushfires – the worst in history; and the Queensland Floods in 2010-2011 – the worst flooding experienced in Australia in 30 years.

More recently, Queensland farmers experienced the devastating effects of Cyclone Debbie which resulted in hundreds of millions of dollars in lost crop. In response, joint State and Federal Category B assistance under the Natural Disaster Relief and Recovery Arrangements was activated. This included concessional loans of up to A\$250,000, essential working capital loans of up to A\$100,000, and freight subsidies of up to A\$5,000 for producers in the affected regions.

Not surprisingly then, the Insurance Council of Australia (ICA) (the representative body for the insurance industry in Australia) wants government to develop more effective and sustainable responses to disasters in Australia. It considers insurers to be well-placed to respond as the insurance

industry operates as both a risk transfer system and a risk management mechanism, because insurers carry out loss prevention and loss mitigation measures in conducting their business.

Agriculture – the impact of climate change

Agricultural production is closely connected with the weather. Climate change, particularly where it leads to adverse weather events such as droughts or excessive rainfall, can lead to significant volatility and strain on the industry. This volatility makes investing in the agriculture industry high risk.

Insurers are well-placed to leverage off their expertise in loss prevention and loss mitigation in order to support policy-makers and communities to respond to the climate change. In 2011, the ICA released a ten-point plan containing policy and industry initiatives aimed at developing a more effective and sustainable response to disasters in Australia.

The key objectives of the plan relevant to the agriculture industry and crop insurance include

- Implementing a standard definition for flood through legislative reform of the Insurance Contracts Act.³
- Improving understanding of insurance cover. This is particularly relevant as insurers refine traditional insurance products in response to climate change.
- Providing adequate flood data.
- Measuring the effectiveness of disaster relief payments.

One of the key policy reforms being proposed is the abolition of insurance taxes. The ICA submits that taxes on insurance serve to discourage the purchase of insurance or selection of the right amount of cover.

Overseas examples – subsidies and crop insurance in the United States

Alternative options include government funded subsidies to incentivize the uptake of crop insurance. In the United States, premiums cost around US\$49.5 billion annually and the federal government contributes about 60 percent of that cost. Farmers pay the balance of the premium. For insurers providing crop insurance, they are guaranteed a 14 percent return.

³ This has already been achieved through the implementation of the Insurance Contracts Amendment Act 2012 which came into force on 15 April 2012.

However, the federal crop insurance program in the United States is expected to cost US\$88 billion between 2017 and 2026. Under the Trump administration, there are proposals on foot to cut US\$28 billion from the program. In releasing its budget, the administration noted:

“The goal of this proposal is to optimize the current crop insurance program so that it will continue to provide a quality safety net at a lower cost.”

It argues that farmers do not need an incentive to participate in crop insurance as it is already an integral part of their business model. It also proposes reducing the cap on the revenue of farms entitled to the subsidy from US\$900, 000 to US\$500, 000.

Access to finance

Access to finance is critical to the agriculture sector. Financial institutions are now looking to the implementation of risk management strategies to increase access to borrowing by linking financing with the risk management skills of insurers. Risk transfer options, such as crop insurance, are an integral part of helping the industry to reduce financial risks and attract loans thereby increasing investment which in turn leads to higher productivity. If adverse weather conditions result in crop shortage, farmers still have liquidity contingent upon their access to insurance. However, this can only be achieved through timely payments to farmers.

The creation of insurance products which cover the farmer in the event of crop shortage can be used as collateral with the bank. The development of these insurance solutions enables the industry to become more robust and resilient in the face of new and emerging risks. Increased investment in agriculture leads to higher productivity which drives down commodity prices.

However, traditional insurance schemes may not work for the emerging risks facing the agriculture industry. Added to that, many producers require insurance solutions tailored for their specific requirements necessitating a risk assessment on a case-by-case basis. This creates feasibility and affordability issues.



Incentivizing the uptake of crop insurance

Insurance industry participants, particularly those involved in the areas of “emerging risks”, are now developing new products to respond to perils not covered under traditional insurance products (e.g. drought and excessive rainfall). However, there has not been a huge uptake of these products since their release. By 2016, unsubsidized multi-peril crop insurance (MPCI) products in Australia were being purchased by less than one percent of crop farmers.

In response, the Independent Pricing and Regulatory Tribunal (IPART) were asked to evaluate five measures to increase its uptake. IPART also considered a proposed subsidy for MPCI premiums. It recommended that a subsidy, if introduced, should only be introduced as a temporary measure as it could not find evidence that the low uptake of MPCI was due to a market failure. It also found that the expenditure on an effective subsidy for insurance would be greater than any savings in drought assistance.

IPART considered that a subsidy would be a more effective tool to increase the uptake of MPCI than a stamp duty waiver as it would provide the impetus for people to investigate MPCI and once there is sufficient uptake, it would drive the costs down enabling the Government to phase out the subsidy.

However, in responding to the IPART report, the Government declined to introduce a subsidy scheme. Instead, it announced that it would remove the 2.5 percent stamp duty on MPCI from January 1, 2018 to make it more affordable for farmers. IPART consider that this measure is unlikely to reduce the costs of the insurance enough to materially increase the uptake of insurance.

Technological advancements

One of the disincentives of traditional crop insurance products is the heavy administration burden involved in assessing claims based on crop shortages. As the agriculture sector is easily disrupted by adverse weather conditions, farmers are significantly at risk when required to run at a reduced capacity leading to higher operating costs and financial loss.

In some places, the industry is now looking to index-based weather derivatives which cut the administrative burden and ensure prompt payout after a loss as there is no additional proof of loss or farm visits required to assess the crop.

New technology using remotely sensed data can provide farmers with insights on the current crop and weather conditions and allow them to better manage and efficiently grow their portfolios. Insurers are now developing satellite-based index insurance products to provide cost-effective and sustainable risk mitigation solutions to farmers.

Index-based solutions require comparatively minimal administration and high efficiency. They can be structured and tailored in a way to meet the specific demands of various states. Claims under weather index-based covers are settled in accordance with pre-agreed payout calculations that depend on one or several triggers.

Crop insurance can also be based on other satellite data such as the normalized difference vegetation index (NDVI) that measures the chlorophyll content of the crop. Insurance payouts are made if during the insurance period the actual NDVI value falls below a predefined threshold value enabling timely payments and avoiding the cumbersome loss assessment required in assessing losses in traditional crop insurance products.

Conclusion

Australia is prone to natural disasters and catastrophes such as flooding, bushfires and severe storms. Ensuring that there is appropriate insurance protection in place is critical to a resilient agriculture business. This is particularly crucial to encouraging investment in, and therefore the ongoing health of, the industry. Absent government funding, farmers need to consider how insurance and other risk transfer strategies can reduce their exposure to the growing risk of climate change.

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Agrivoltaic – solar powering the future of agriculture

Steffan Shute

The sun has long been a source of free and clean energy in the world of agribusiness, providing crops the nourishment they need to grow. However, the wider energy sector is now starting to utilise solar power for agricultural technology as well. Global investment in solar power generation is growing very fast. Solar energy increased its share of global electricity generating capacity by 50 percent in 2016 alone, overtaking growth in wind, gas and other renewable technologies¹. The cost of solar photovoltaic cells – the major capital cost in solar installations using that technology – has fallen 80 percent since 2008². Technological innovation and manufacturing competition have intensified and Chinese manufacturers have gained significantly in market share.

Rooftop solar photovoltaic cell installations – a form of what is referred to in the electricity sector as distributed generation, located at the point of use – are now widespread. They are usually connected to the low-voltage electricity distribution grid and have often benefitted from feed in tariff incentive schemes, whereby the owner receives revenue for feeding surplus electricity into the grid. Even as incentive schemes have been scaled-back or withdrawn, falling capital costs are helping to keep these installations attractive. Solar microgeneration for isolated agricultural applications such as irrigation pumping and electric fencing is also now familiar, flexible and cost effective.

Rooftop solar that is not connected to the grid remains an elusive proposition. Even though the cost of solar photovoltaic cells has fallen

significantly, the inability of such installations to provide round-the-clock output is a limitation for 24 hour energy intensive processes such as crop drying and food processing. This may change in the longer term as better and more cost-effective battery storage solutions become available, enabling users to make fuller use of their solar modules balancing their own demand.

Of increasing significance are large-scale solar parks, where arrays of solar PV modules are mounted on frames and owned and operated by developers. These parks now exist at utility scale. Such parks require a great deal of space, so that the rows of modules do not shade each other. They may cover a number of hectares and low-grade agricultural land is ideal for such ventures. The frames are usually low in height and installed over grass. The grass either has to be kept cut – a

labor-intensive maintenance expense – or can be combined with suitable activities such as sheep grazing.

Recent years have seen renewed experimentation with the concept of “agrivoltaics” (or “agrovoltaics”, to use the spelling adopted in continental Europe), where solar panels and arable farming share the same land. The concept is that narrow panels are mounted at wide spacing on high frames and under-sown with valuable food crops. The panels shade the crops to some extent but the microclimatic effects are complex and site-specific. Shading may be a benefit or a disadvantage, taking into account effects such as the impact of the shade on evaporation rates. The effect on crop yields may therefore be positive, neutral or negative. Agrivoltaics seems generally to be well suited to market gardening, perhaps less so to arable crops. The agrivoltaic system also reduces the maintenance issues associated with more closely-spaced solar panels and puts the land to productive agricultural use. However, there are still some issues with cultivation operations to be weighed up, such as limiting the size and efficiency of farm machinery that can be deployed under and between the frames.

Of greater potential significance in countries with high levels of insolation is an alternative technology to photovoltaics: concentrated solar plants. Concentrated solar plants use

¹ IEA, Renewables 2017.

² HM Government, The Clean Growth Strategy.



parabolic mirrors to concentrate the sun's energy on a vessel containing a medium of oil or salt, which becomes superheated. The heat from the oil or salt medium is used to heat water in a heat exchanger and the steam is then used to run conventional steam turbine generating units. These steam turbines can be dispatched to meet electricity demand in a similar way to non-renewable plants – overcoming a key limitation of photovoltaic technology. Crucially, the heat in the oil or salt medium is retained for some time after sunset and the plant can therefore continue to generate into the evening electricity peak demand.

Concentrated solar plants are not yet widespread but agriculture is well ahead of the game. Last year, a company in South Australia – the driest state on the driest continent

on Earth – completed a 1.5MW concentrated solar plant, which it uses for its agricultural operations. It cools 20 hectares of adjacent greenhouses and runs seawater desalination and water treatment plants for the farm's irrigation purposes. Inside the greenhouses: a year-round controlled climate which produces 15 percent of Australia's tomatoes and exemplifies how food production can be adapted to even the harshest of environments in a sustainable manner.

The largest grid-connected concentrated solar installation in the world – with a capacity of 1,177MW – is currently under construction in Abu Dhabi and rivals traditional fossil fuel plants in size. Very large arrays of this type are also planned in Tunisia, in conjunction with interconnectors that will enable power to be exported

to Europe. The challenge is also being taken up in Morocco, a country almost entirely dependent on energy imports, which has adopted ambitious renewable energy targets. Following the commissioning of the first phase of an ambitious concentrated solar plant at Ouarzazate last year, the country has announced plans to increase renewable generation to over 40 percent of its requirements by 2020 and over 50 percent by 2030. This scheme has a strong agricultural dimension, with plans to use subsidized solar power for irrigation pumping, opening up 100,000 hectares of new farmland.

Steffan Shute is a associate in our London office.

Food for thought: the Modern Slavery Act's impact in fresh food retail, wholesale and agriculture

Abigail McGregor

The Australian food retail, wholesale and agriculture industries are no strangers to reports of poor treatment of migrant workers on Australian farms, often involving labor hire companies¹.

Due to the nature of the work involved in the production, processing, packaging and transport of food and produce, these supply chains have a high risk of modern slavery².

While the major supermarkets already have anti-slavery programs in place, other businesses operating in the food and agriculture industries, including *producers, distributors, packers, exporters and caterers*, may not be fully prepared for the introduction of a new corporate reporting requirement.

A taste of modern slavery risk ...

- Engagement of labor hire contractors who recruit backpackers and seasonal workers for fruit and vegetable picking on farms, without express obligations concerning ethical recruitment and retention of laborers³.
- Poor conditions, passport retention and bonded labor in food processing⁴.
- Procurement of high risk foods across maritime borders, particularly from emerging economies, such as crustacea, corn, palm oil, poultry, rice, sesame, wheat, sugarcane, cattle, beans, coffee and cocoa beans, seafood, nuts and tea, including forced labor risks involved in shipping, and transport of these products⁵.

On August 16, 2017, the Australian Minister for Justice Michael Keenan announced that the Federal Government proposes to introduce legislation to require large businesses to report annually on their actions to address modern slavery. This announcement reinforces Australia's commitment to having one of the strongest responses to modern slavery in the world. We have been actively participating in the Attorney-General's Department national consultation process to refine the Government's proposed Modern Slavery in Supply Chains Reporting model.

It is currently proposed that businesses with revenue of A\$100 million+ will be required to report annually on their efforts to identify and stop modern slavery in their operations and supply chains. There is no doubt that many businesses in the food retail, wholesale and agriculture industries will face intense public scrutiny, especially given the high risk of modern slavery in the sector.

In this update, we look at modern slavery risks in the food and agriculture sectors, the likely implications of a new reporting requirement for Australian businesses that operate in that sector and what they can do to prepare.

¹ Parliament of Victoria, Economic Development Committee, Inquiry into Labour Hire Employment in Victoria, Interim Report December 2004 and Final Report, June 2005, and Victorian Government Department of Economic Development, Jobs, Transport & Resources Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report 31 August 2016 http://economicdevelopment.vic.gov.au/data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report.pdf; Parliament of Australia, Senate Education and Employment References Committee, A National Disgrace: The Exploitation of Temporary Work Visa Holders (17 March 2016); Parliament of Australia, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation Committee, Making it work: Inquiry into independent contracting and labour hire arrangements (Canberra, August 2005); Australian Government, Fair Work Ombudsman, A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales June 2015.

² Findings of the Trafficking in Persons Report suggest that while traditionally the majority of human trafficking and slavery investigated in Australia have related to women subjected to sexual exploitation, there has been an increase in the number of referrals and investigations relating to other forms of labour exploitation especially in the agriculture, construction, hospitality and domestic services industry – and is now comparable with those subjected to sexual exploitation. See Australian Government "Trafficking in persons: the Australian Government Response 1 July 2015 – 30 June 2016" The Eighth Report of the Interdepartmental Committee on human trafficking and slavery (2016) p 23 <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-of-the-interdepartmental-committee-on-human-trafficking-and-slavery-july-2015-to-june-2016.pdf>.

³ Kallee Buchanan "Backpacker farm labour 'modern day slavery'" 19 July 2017, AM, ABC Radio, recording available online: <http://www.abc.net.au/news/2017-07-19/backpacker-farm-labour-modern-day-slavery/8722320>.

⁴ Caro Meldrum-Hanna and Ali Russell "Slaving Away" ABC Four Corners (6 May 2015) <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.html>.

⁵ See further Business & Human Rights Resource Centre An introduction and commentary to the 2011 UN Guiding Principles on Business and Human Rights and their implementation in the maritime environment 2016 available online: <https://www.humanrightsatsea.org/wp-content/uploads/2015/05/HRAS-UNGP-Report-2016-low-res-dps.pdf>.

Sugarcane from the Dominican Republic, Brazil, Myanmar and Pakistan

Cattle from Brazil, South Sudan and Niger

Coffee and Cocoa from Cote d'Ivoire, Colombia, and Nigeria

Nuts from Peru and Bolivia

Corn from Bolivia



Sunflowers from Myanmar

Prawns from Thailand and Myanmar

Fish from Ghana, Indonesia, and Thailand

Palm Oil from Malaysia

Sesame and Beans (green, soy, yellow) from Myanmar

What is modern slavery?

At its broadest, the term “modern slavery” incorporates any situations of *exploitation where a person cannot refuse or leave work because of threats, violence, coercion, abuse of power or deception*. It includes slavery, servitude, forced labor, debt bondage, and deceptive recruiting for labor or services.

The Australian Government proposes that for the purpose of the reporting requirement, modern slavery will be defined to incorporate conduct that would constitute a relevant offence under existing human trafficking, slavery and slavery-like offence provisions set out in divisions 270 and 271 of the Commonwealth Criminal Code. However, the exact scope of “Modern Slavery” is the subject of consultation and it remains unclear whether the definition of Modern

Slavery will go beyond the Criminal Code offences.

Recent industry examples

- Enslavement on Thai fishing vessels to assist in producing seafood sold across the world, including to Australia⁶.
- Immigrant laborers on farms being routinely abused⁷.
- Employers withholding wages or forcing staff to work at rates lower than those previously agreed.

- Labor agents confiscating the passports of migrant workers, often with little grasp of English, forcing them to work and live in squalid conditions.
- Recruitment fees payable by employees from future wages⁸.

How will a Modern Slavery Act affect food and agriculture businesses?

Given the bipartisan support for a Modern Slavery Act, Australia is likely to have a reporting requirement relating to modern slavery that could be in place as early as 2018. The

⁶ <https://www.humanrightssea.org/wp-content/uploads/2015/05/HRAS-UNGP-Report-2016-low-res-dps.pdf>

⁷ Caro Meldrum-Hanna and Ali Russell “Slaving Away” ABC Four Corners (6 May 2015) <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.html>.

⁸ Fair Work Ombudsman, “Growers, hostels, labour-hire contractors cautioned over backpacker, seasonal worker entitlements” 5 January 2015 <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/january-2015/20150105-dont-get-ripped-off-this-harvest-season>

likelihood is that the new Australian regime will be similar in many respects to the UK regime.

The current proposal would require businesses to address the following matters in their statements

- The entity's structure, its operations and its supply chains.
- The modern slavery risks present in the entity's operations and supply chains.
- The entity's policies and processes to address modern slavery in its operations and supply chains and their effectiveness (such as codes of conduct, supplier contract terms and training for staff).
- The entity's due diligence processes relating to modern slavery in its operations and supply chains and their effectiveness.

The Joint Standing Committee on Foreign Affairs, Defense and Trade, which is responsible for the ongoing Inquiry into establishing a Modern Slavery Act in Australia, has given its in principle support for the Australian Government to publish a list of businesses *obliged to report and a list of businesses that fail to report*. A publicly accessible central repository for published statements is also proposed.

Australian businesses ought to expect that there will be significant public criticism of those businesses that do not comply with their reporting obligations and that statements, once published, will be subject to intense public scrutiny, as has been the case in the UK.

The existence of a central repository of statements will facilitate the monitoring and review of statements.

It is also likely to assist businesses, consumers and other stakeholders to understand the steps being taken by businesses to eradicate modern slavery in their operations and supply chains and take more effective steps to address the underlying issues.

What is the industry doing already?

As highlighted above, the food and agriculture industries are no strangers to the risk of modern slavery. While the Federal Government and regulators have taken action in investigating allegations of abuse of vulnerable migrant workers on farms, industry participants have taken some steps towards addressing these risks, with varying results, including:

- Adoption of the UN Guiding Principles on Business and Human Rights Reporting Framework and membership to the UN Global Compact.
- Establishing a national labor hire certification scheme with training programs for employers in horticulture and pack houses, for example the Fair Farms Initiative.
- Sourcing products that come with ethical certification such as UTZ certification, and Fair Trade.
- Participation and membership of data-sharing organizations to audit suppliers such as the Suppliers Ethical Data Exchange.

In the meantime, civil society groups and other organizations have created their own public databases to rate businesses' compliance with human rights and sustainability standards, including

- Oxfam's Behind the Brands Campaign.
- Know the Chain's benchmark on food and beverage companies.
- Corporate Human Rights Benchmark which assesses 98 of the largest publicly traded companies in the world on 100 human rights indicators.
- Apps like "Shop Ethical!" which provide information on the environmental and social record of companies behind common Australian supermarket brands.
- Dow Jones Sustainability Index – a globally recognized independent benchmark that measures the performance of the world's largest 2500 companies.

Unfavorable listings in such databases and indices can have negative reputational effects.

What can food and agriculture businesses do to prepare?

In light of the high risk of modern slavery occurring in food and agriculture businesses and supply chains, many companies are already in the process of reviewing their operations and supply chains and implementing measures to identify and address incidents of modern slavery.

Those businesses that have not already done so should consider taking the following steps

- Mapping the organization's structure, businesses and supply chains.
- Formulating policies in relation to modern slavery – this will involve



collating current policies, identifying gaps, adapting existing policies and formulating new policies, as needed.

- Carrying out a risk assessment – identifying those parts of the business operations and supply chains where there is a risk of modern slavery taking place.
- Assessing and managing identified risks – this may include carrying out further due diligence in the entity’s operations and supply chains and reviewing and adapting contract terms and codes of conduct with suppliers.
- Considering and establishing processes and KPIs to monitor the effectiveness of the steps taken to ensure that modern slavery is not taking place in the business or supply chains.

- Carrying out remedial steps where modern slavery is identified
- Developing training for staff on modern slavery risks and impacts.

Businesses operating in the food and agriculture industries need to be particularly alive to the risk of slavery occurring deep in their supply chains, which are often long and complex.

Well publicized incidents mean that businesses operating in these sectors are likely to be treated as being “on notice” of these risks and the government, media and public will closely monitor the steps they are taking to operate sustainably and ethically.

By undertaking these steps, businesses will be well placed to respond effectively to new regulations and show

that they are committed to eradicating modern slavery, in Australia and overseas, and taking concrete steps to achieve that outcome.

Norton Rose Fulbright has experience in Australia and globally assisting clients with modern slavery risk management and reporting, as well as broader business and human rights advice. We made a submission to the Inquiry (No. 72) and participated in the public hearing held in Sydney on 23 June 2017.

We also have been actively participating in the Attorney-General’s Department national consultation process to refine the Government’s proposed Modern Slavery in Supply Chains Reporting model.

Abigail McGregor is a partner in our Sydney office.

EU competition policy in the agriculture sector

Jay Modrall

Continuing economic pressure on EU farmers has created an intense focus on the extent to which farmers can cooperate with one another consistent with EU competition rules. There are about 11 million farms in the European Union (EU) and 44 million people employed in the EU food supply chain. According to the EU Commission (the Commission), as the EU common agricultural policy (CAP) has become more market-oriented and European agriculture is increasingly integrated in global markets, farmers are exposed to greater market uncertainties and price volatility. Farmers often work independently, with little collective bargaining power to defend their interests against food processors and retailers.

As a result, EU legislation provides for certain exemptions to allow farmers to cooperate in ways that might otherwise be prohibited by EU competition rules. However, the Commission, Council and Parliament are all looking at ways to counter imbalances in information and negotiating power, including expanding and simplifying the existing antitrust exemptions. In 2016, the Commission created an Agricultural Markets Task Force, which in November 2016 adopted a final report, which recommended expanding and “reviving” existing agricultural exemptions. In August 2017, the Commission launched a consultation on improving the food supply chain, including by expanding an existing exemption for so-called “value sharing agreements.” The Commission’s 2018 work programme envisages proposed legislative changes in early 2018. Meanwhile, however, the European Council and Parliament are not waiting; in October 2017 they agreed in the context of their annual budget

negotiations to revise the existing agricultural antitrust exemptions.

Most recently, the European Court of Justice (ECJ) issued a preliminary ruling on November 14 in a case involving the relationship between EU and French competition rules and EU agricultural policy (*Belgian Endives*), agreeing with French endive producers that conduct necessary to achieving authorized objectives of a recognized producer organization (PO), association of POs (APO) or “interbranch organisation” is exempt from EU antitrust rules even if the conduct is not covered by an express exemption. *Belgian Endives* is the most significant judgment in this complex area since the ECJ’s 2003 judgment in *Milk Marque*.

Together, the EU legislator and courts are reshaping the legal framework for the application of EU competition rules to cooperation in the agricultural sector. Although political pressures have generated quick action in

particular by the Council and Parliament, in the long term the most significant development expanding EU farmers’ ability to increase their bargaining power by cooperating with one another may prove to be the *Belgian Endives* judgment.

Background

EU competition law in the agricultural sector is a complex patchwork of general EU competition rules and highly technical sector-specific rules. Article 42 of the Treaty on the Functioning of the European Union (TFEU) provides that EU competition rules apply to the production of and trade in agricultural products only to the extent determined by EU regulations adopted under the CAP. These regulations do extend EU competition rules to the agriculture sector, but they also provide for certain exemptions for POs, APOs and interbranch organizations.

The current legal framework is set out in Regulation 1308/2013, which replaced Regulation 1234/2007. Article 206 of Regulation 1308/2013 provides that EU competition rules apply to all agreements, decisions and practices relating to the production of, or trade in, agricultural products, subject to certain derogations. These derogations include general derogations for certain agreements, decisions and concerted practices, which largely reproduced exemptions in Regulation 1234/2007 and prior

regulations, as well as a number of sector-specific derogations introduced by Regulation 1308/2013.

The general derogations are set out in Articles 209 and 210 of Regulation 1308/2013. Article 209(1) exempts (i) agreements, decisions and practices “necessary for the attainment of the objectives” of the CAP and (ii) agreements, decisions and practices of farmers, farmers’ associations, or associations of such associations, or recognized producer organizations or associations of producer organizations, unless the agreement, decision or practice entails an obligation to charge an “identical price” or “excludes competition.” Article 210(1) CMO Regulation provides that Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices of recognized interbranch organizations with the object of carrying out activities that are permitted for interbranch organizations in general or for their specific sectors. Article 210(2) of Regulation 1308/2013 provides that the derogation for interbranch organizations only applies where the relevant agreement, decision or practice has been notified to the Commission and the Commission has not found that it is incompatible with Union rules within two months. The counterparts of these articles in Regulation 1234/2007, the main focus of *Belgian Endive*, were Articles 176 and 176a.

In addition, Articles 169-171 of Regulation 1308/2013 set out derogations for the olive oil, beef and veal products and certain arable crops. Under these articles, joint sales and agreements on quantities are allowed provided that (i) producers integrate in POs, (ii) these POs carry out activities other than joint-selling that create efficiencies (such as joint procurement, joint distribution, joint storage, etc.)

and (iii) the sales of the producer organizations do not exceed certain share thresholds.

In addition to these three sector-specific derogations, Regulation 1308/2013 sets out special rules for the dairy, ham and sugar, fruit and vegetables and wine sectors. In particular, the rules allowing value-sharing agreements in the sugar beet sector are set out in Article 125 of Regulation 1308/2013, as implemented by Commission Regulation 2016/1166. These special rules for the sugar beet sector were considered necessary to address challenges stemming from the end of the sugar beet quota system in October 2017, which would otherwise compromise the position of beet growers. Commission Regulation 2016/1166 authorised the continued negotiation of value-sharing agreements between an individual grower and its current and potential suppliers to secure their supplies on pre-defined purchase terms, sharing the profits and costs generated by the supply chain to the benefit of the beet growers.

The antitrust exemptions set out in Regulation 1308/2013 and prior regulations are highly technical, and they have been narrowly interpreted by the Commission and the European Courts. Regulation 1308/2013 also eliminated a prior system of notification to the Commission, creating legal uncertainty by requiring POs and APOs (but not interbranch organizations) to rely on their own assessment of whether a proposed agreement complied with one of the available exemptions. As a result, according to the Agricultural Task Force, the exemption system has become overly complex and “dormant.” The Commission, Parliament and Council initiatives discussed below are designed to simplify and expand the

current exemptions. In *Belgian Endives*, the ECJ took a different approach, considering whether agreements, decisions and concerted practices that are necessary and proportionate to achieving the objectives of POs, APOs and interbranch organizations are exempt from EU competition rules without the need to meet the specific conditions of Articles 209, 210 or other provisions of Regulation 1308/2013.

EU Commission Consultation

In its consultation, the Commission sought input on three main topics: potentially unfair trading practices in the food supply chain; the possible need for increased market transparency in the food supply chain; and the advisability of extending the existing exemption for value-sharing agreements in the sugar beet sector to other agricultural products.

As noted, under existing rules, beet growers and sugar processors can agree to secure their supplies on pre-defined purchase terms with the certainty of sharing the profits and costs generated along the supply chain. For example, some of the agreements on value sharing link the price paid to farmers for sugar beets to the market price of sugar. Value sharing agreements are voluntary and are only allowed between one sugar processor and its current or potential supplying beet growers.

In its consultation, the Commission asked for input on whether the possibility to enter into value-sharing agreements in the sugar sector can also be of interest to farmers in other sectors. Although the consultation only closed on November 17, as noted, the Commission’s 2018 work programme foresees that the Commission will propose legislation in this area in



the first quarter. As discussed below, however, the Commission's proposals in relation to value-sharing agreements (though not other aspects of the consultation) may become superfluous in light of amendments to Regulation 1308/2013 already agreed by the Council and the Parliament.

Agricultural Exemptions and the Omnibus Regulation

As mentioned, without waiting for the Commission, the Council and the Parliament agreed to make a number of changes to CAP regulations, including the antitrust exemptions discussed above, in the context of their negotiations on the so-called "Omnibus Regulation" on the financial rules applicable to the EU budget. While the final text has not been published, the new rules include a number of significant changes.

As proposed in the Commission consultation, the possibility to collectively negotiate value sharing terms in contracts will be extended to sectors other than sugar. Similarly, the exemptions for planning production, optimizing production costs, placing on the market and negotiating contracts for the supply of agricultural products in the olive oil, beef and veal and certain arable crops sectors will be extended to all sectors, subject to safeguards in relation to POs to guarantee that competition is not excluded. The revisions will also involve a simplification of the sector-specific rules on fruit and vegetables and wine.

The revisions agreed by the Council and Parliament will simplify and expand the existing antitrust exemptions, in particular by allowing recognized POs to conduct collective negotiations on behalf of their members in all agricultural products and to allow

individual growers to negotiate value-sharing agreements with current and potential customers. Subject to reviewing the final text, however, it does not appear that the Council and Parliament plan to relax the strict conditions in the existing exemptions. Indeed, new language will apparently be added to the provisions governing POs to safeguard competition.

The agreement also apparently does not include steps recommended by the Agricultural Task Force to re-introduce a system for notifying proposed agreements to the Commission to increase legal certainty. Thus, while these changes will be welcomed by growers in sectors that do not currently benefit from the current sector-specific exemptions in Regulation 1308/2013, it is not clear that they will fundamentally change the application of EU competition rules in the agricultural sector.

Belgian Endives

The decision that gave rise to the *Belgian Endives* judgment was the French Competition Authority's decision of March 6, 2012 fining a large number of organizations involved in the cultivation and sale of Belgian endives for participation in a complex and continuous cartel consisting of (i) an agreement on the price of endives through different mechanisms — such as disseminating a minimum price on a weekly basis, setting a “*cours pivot*” (central rate), establishing a trading exchange, setting a “*prix cliquet*” (reserve price) and misusing the withdrawal price mechanism, (ii) collusion on the quantities of endives placed on the market and (iii) a system for the exchange of strategic information used for the purpose of price maintenance, with the aim of collectively fixing a minimum producer price for endives. According to the decision, this conduct allowed producers and several professional POs to maintain minimum sale prices between 1998 and 2012.

The producers argued that their conduct should be regarded as necessary for the attainment of the objectives of the CAP, but the French Competition Authority found that the specific derogations in Regulation 1234/2007 did not apply. The producers appealed to the Cour d'appel de Paris, which found for the producers, holding that the French Competition Authority had not established that the dissemination of minimum price instructions was necessarily and definitively prohibited, so that it had not been indisputably established that the producers had exceeded their authority as regards price stabilization.

The French Competition Authority, supported by the EU Commission, appealed to the French Cour de

Cassation. The Cour de Cassation requested an ECJ ruling on whether conduct otherwise caught by Article 101 TFEU can be exempted if it is linked to responsibilities assigned to national agricultural organizations, even if the conduct is not specifically covered by express antitrust exemptions under CAP regulations; and if so, whether collectively fixing minimum prices, concerting on quantities placed on the market or exchanging strategic information can be exempted if they aim at achieving the EU policy objectives of stabilizing producer prices and adjusting production to demand.

The ECJ interpreted the CAP exemptions from EU antitrust rules more broadly than in past judgments. The ECJ noted that a PO or APO may have recourse to certain forms of coordination and concertation to achieve the objectives of ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity; concentrating supply and placing on the market the products produced by its members; and optimizing production costs and stabilizing producer prices. According to the ECJ, practices necessary to achieve one or more of those objectives must also be exempt from Article 101(1) TFEU. In other words, the phrase “save as otherwise provided” in the article extending EU competition rules to the agricultural sector is not limited to the express derogations in Articles 176 and 176a of Regulation No 1234/2007 (now Articles 209 and 210 of Regulation 1308/2013).

On the other hand, the ECJ noted that the scope of the regulation's antitrust exemptions is to be construed strictly, citing *Milk Marque* for the proposition that “the common organizations of the markets in agricultural products are not a competition-free zone . On the contrary, the maintenance of

effective competition on the markets for agricultural products is one of the objectives of the common agricultural policy and of the common organisation of the markets”. In accordance with the principle of proportionality, moreover, the practices in question may not go beyond what is strictly necessary to achieve one or more of the objectives assigned to the PO or APO at issue under the rules governing the common organisation of the market concerned.

The ECJ proceeded to discuss whether POs, APOs and professional organizations' practices of intervening in the endive sector to collectively fix minimum sale prices, concert on the quantities placed on the market and exchange strategic information, are exempt from Article 101(1) TFEU. The ECJ noted that Member States are required to recognise POs and APOs that specifically take responsibility for one of the objectives defined by CAP regulations. To be considered exempt from EU competition rules on the basis that it is necessary to achieve one or more CAP objectives, the ECJ said, a practice must have been implemented by an entity that is actually entitled to do so under the applicable CAP rules. An entity not recognized by a Member State as responsible for these objectives cannot benefit from exemption from Article 101(1) TFEU. That was likely to be the case for a number of professional organizations covered by the French Competition Authority's decision, which did not appear to be recognized POs, APOs or interbranch organizations.

To be exempted, moreover, any such practices must remain within a single PO or APO. Indeed, the responsibilities for production planning, concentrating supply and placing on the market, optimizing production costs and stabilizing producer prices, which may be assigned to a PO or an APO, may relate solely to the production

and marketing of that PO's or APO's members. Accordingly, agreements or concerted practices between POs or APOs go beyond what is necessary in order to fulfil those responsibilities and could not be exempt from Article 101(1) TFEU.

Concerning practices between their members, recognized POs and APOs must be responsible specifically for at least one of the recognized objectives. The ECJ noted that the objectives of ensuring that production is planned and adjusted to demand, concentrating supply and placing on the market the products produced by members, and stabilizing producer prices, necessarily entail the exchange of strategic information between individual producers that are members of the PO or APO concerned. Therefore, exchanges of strategic information between producers within the same PO or APO are liable to be proportionate if they are made for the purposes of one or more of the objectives assigned to that PO or APO and are limited only to the information that is strictly necessary for those purposes.

The objective of stabilizing producer prices to ensure a fair standard of living may also justify coordination between agricultural producers in the same PO or APO with regard to the quantities of agricultural products put on the market. The objective of concentrating supply to strengthen the position of producers may also justify coordination of the pricing policy of PO or APO members, particularly where the PO or APO concerned has been assigned the responsibility for marketing all its members' products.

By contrast, the collective fixing of minimum sale prices within a PO or an APO may not be considered necessary to fulfil the responsibilities assigned to them. Where it does not allow producers selling their own products

themselves to sell at a price below those minimum prices, the ECJ said, this practice is not proportionate to the objectives of stabilizing prices and concentrating supply since it has the effect of further reducing the already low level of competition in the markets for agricultural products resulting from the formation of POs and APOs to concentrate supply.

Conclusion

The disparity in the number and size of EU farmers and their suppliers and customers has long created tensions between the objectives of the CAP and EU competition policy. For decades, CAP regulations have provided for derogations from EU competition rules to allow farmers to cooperate through POs, APOs and interbranch organizations in ways that might otherwise fall afoul of EU competition rules. These derogations, however, are highly technical and have been interpreted so narrowly that the Agricultural Task Force described them as "dormant." In the 2013 revamp of the CAP regulation, new exemptions were added to encourage collective negotiation by growers in certain sectors and vertical value-sharing agreements between growers and customers in the sugar beet sector.

While the Commission has been considering changes to expand and simplify these exemptions (among other steps to improve the food supply chain), the Council and Parliament have raced ahead to extend the recent sector-specific exemptions across all agricultural sectors. While these changes will be welcomed by many EU farmers, these exemptions will likely remain complex and be interpreted narrowly. Thus, it is questionable whether they will result in fundamental changes to the food supply chain.

The ECJ's judgment in *Belgian Endives* takes a very different approach. Rather than addressing the limitations of express antitrust exemptions in the CAP regulations, the ECJ held that conduct that is necessary and proportionate to the authorised objectives of a recognized PO or APO is automatically exempt from EU competition rules, regardless of whether the criteria of express derogations are satisfied. This implied exemption extends even to exchanges of strategic information, coordination on the quantities of products placed on the market and coordination of pricing policy (though apparently not minimum prices to be charged by farmers marketing their own products). Thus, *Belgian Endives* may prove more helpful to farmers than the agreed amendments to the CAP's antitrust exemptions.

On the other hand, the ECJ's approach extends only to activities of farmers within recognized POs, APOs and interbranch organizations, and not to vertical value-sharing agreements. For these agreements, farmers will continue to refer to CAP exemptions, as soon to be extended from sugar beet growers to the entire sector. The relationship between EU competition policy and the CAP will continue to be fraught, and complex, for the foreseeable future.

Jay Modrall is a partner in our Brussels office.

The national Australian Water Register is here. Do you need to register?

Michael French and Michelle Ralston

All foreign persons (including foreign government investors) are required by November 30, 2017 to register their Australian registrable water entitlements and contractual water rights (water entitlements) on the new Water Register regardless of value and the industry sector the water entitlement is used for.

From December 1, 2017 all foreign persons must then update their information on the Water Register no later than July 30 each year.

Why has the Water Register been introduced?

The Water Register is part of the Australian Commonwealth Government's measures to provide a transparent picture of foreign investment in Australian water entitlements and give the Australian community greater confidence in the foreign investment regime.

What types of water entitlements need to be registered?

Registrable water entitlements and contractual water rights need to be registered on the Water Register.

A registrable water entitlement is

- An irrigation right which a person has against an irrigation infrastructure operator to receive water, but excludes a water access right or a water delivery right.
- A right conferred by or under a law of an Australian State or Territory to hold water from a water resource,

to take water from a water resource or do both.

A contractual water right is a contractual right that a person holds in respect of another person's registrable water entitlement.

Stock and domestic rights, riparian rights and annual water allocations therefore do not need to be registered on the Water Register.

How are water entitlements registered?

Registration of water entitlements are made online at https://www.ato.gov.au/firb_land_registration/. There is no charge to register.

Michael French is a partner and Michelle Ralston is special counsel in our Brisbane office.



MiFID II: Agriculture derivatives market participants face fast approaching regulatory changes

Anna Carrier

Directive 2014/65/EU on markets in financial instruments (MiFID II) will enter into force on 03 January 2018 and will introduce significant changes to the way that agriculture commodity market participants can engage in transactions in financial instruments. In order to continue transacting in financial instruments – such as commodity or foreign exchange (FX) derivatives – as of 03 January 2018 a person will have to be either authorized or exempt. MiFID II significantly restricts the current exemptions from the authorization requirements available to non-authorized persons. Finally, all commodity derivatives will be subject to position limits and reporting obligation.

Authorized or exempt? Ancillary activity test

In order to continue transacting in financing instruments post-January 3, 2018 a person will have to be either authorized or exempt. MiFID II changes the way the exemption regime for non-authorized persons operates and all currently exempt persons will need to re-assess their eligibility for exemptions. Article 2(1)(j) MiFID II (aka the “ancillary activity exemption”) is the only exemption specifically designed for commodity derivatives market participants. It provides an exemption from the general authorisation requirement for persons who deal on own account in commodity derivatives, emission allowances, and derivatives thereof or provide investment services in these financial instruments to customers or suppliers of its main business, subject

to two cumulative conditions: (1) that the relevant activity constitutes “a minority of activities at a group level”; and, (2) that the relevant activity accounts for a small proportion of “overall market trading activity in that asset class. The requirement to conduct relevant analysis at the group level can prove challenging, in particular to large and diversified multinational corporates active in agriculture markets.

The conditions of the Article 2(1)(j) MiFID II exemption are further specified in Commission Delegated Regulation 2017/592 (aka “RTS 20”), which prescribes a test for persons seeking to use the ancillary activity exemption. This test consists of two cumulative parts, i.e. a market share test and a main business test. In July 2017 the European Securities and Markets Authority (ESMA) published the long awaited, albeit incomplete,

market data for over the counter (OTC) and exchange-traded (ETD) commodity derivatives, necessary to complete the market share test. The overall market size for agriculture commodity derivatives amounted to €555,731 million for ETDs and €865,313 million for OTC derivatives (data for 2016), and €1 019,671 million for ETDs (data for 2015). OTC data for 2015 and overall market size data for 2017 have not been published to date. There has been no indication from ESMA when the remaining data set can be expected to be published.

Finally, it is important to note that in accordance with MiFID II, persons will be required to continuously monitor their trading activity as Article 2(1)(j) MiFID II requires submission of annual notifications to national competent authorities (NCAs). At the time of writing of this article some of the NCAs have opened their notification gateways, including the UK Financial Conduct Authority (FCA) and French Autorité des Marchés Financiers (AMF). Mindful of the risk of prospective bottlenecks as we approach the MiFID II application date, it is advisable that firms have their calculations and analysis done in advance and ready for submission once the relevant NCA opens its notification portal. Conversely, firms that will not meet the ancillary activity exemption need to take into consideration the time needed to secure Article 5 MiFID II authorisation.

How do you manage your FX exposures?

In addition to Article 2(1)(j) MiFID II, the majority of agriculture commodity market participants engage in transactions in FX derivatives, usually in order to hedge risks stemming from their commercial operations. Article 2(1)(d) MiFID II sets out an exemption for persons dealing on own account in derivatives other than commodity derivatives, emission allowances or derivatives thereof and as such it is not specific to commodity derivatives market participants.

This exemption is structured differently to Article 2(1)(j) MiFID II, in so far as it does not apply volume thresholds but focuses on the mode of execution of trading activities. Generally, persons being members or participants of a regulated market or multilateral trading facility (MTF) or having direct electronic access to a trading venue (regardless of their regulatory status) will be prohibited from using the exemption. Following “quick fix” MiFID II review in early 2016 the legislators added an exclusion to this list of prohibited activities for non-financial entities who execute transactions “which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of those non-financial entities or their group”. Vaguely drafted and supported by limited regulatory guidance, this exclusion has caused inevitable interpretation questions amongst market participants.

Commodity derivatives position limits and reporting

Article 57 MiFID II introduces position limits for commodity derivatives traded on EU-based trading venues and economically equivalent OTC contracts (EEOTC). The new position limits regime will apply to all persons with positions, held directly or indirectly, in commodity derivative contracts in scope, regardless of their establishment, domicile, or regulatory status. However, non-authorized persons can use the exemption for the positions that are objectively measurable as reducing risks directly relating to the commercial activity of that person (aka the “hedging exemption”). Persons planning to use the hedging exemption will have to submit a suitable application to their NCA. Again, at the time of writing of this article, both the UK FCA and French AMF were at a forefront of NCAs ready to facilitate market participants’ timely compliance with MiFID II requirements as both NCAs launched their respective systems for submitting hedging exemption applications.

However, with less than 60 days for MiFID II to go live, the complete list of position limits published by the NCAs and approved by ESMA is nowhere to be seen. The procedure set out by Commission Delegated Regulation (EU) 2017/591 (aka “RTS 21”) requires the NCAs to submit draft position limits prior to publication to ESMA for a formal review and opinion. Suffice to say, this process has not been particularly efficient and caused significant delays to the timely publication of the limits across all commodity derivatives asset classes.

In August 2017 ESMA published the first of three opinions on the Article 57 MiFID II position limits, approving limits proposed by the French AMF in respect of Euronext Rapeseed, Corn and Milling Wheat No 2 contracts. The AMF proposes to vary spot month limits based on the time remaining until expiry, with a lower limit closer to contract expiry date. Following that, in late October 2017 ESMA published additional three opinions in respect of the FCA-proposed position limits for agricultural futures contracts traded on ICE Futures Europe, including London Cocoa Future, Robusta Coffee Futures and White Sugar Future. At the time of writing, position limits for UK Feed Wheat Futures remained to be published by the FCA. ESMA list of liquid contracts published in October 2017 includes no other agriculture commodity derivative traded on EU trading venue will be subject to bespoke limits, other than those discussed above. New and non-liquid contracts will, however, be subject to de minimis limits.

Finally, while non-authorized persons will not be directly subject to position reporting under Article 58 MiFID II, it is important to consider that certain information regarding positions may be requested by investment firms that will be required to submit EEOTC position reports on behalf of their clients. Positions in exchange-traded commodity derivatives will be reported by trading venues.

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Food safety

FDA commissioner discusses greater scrutiny of health claims on food packaging

Cori Goldberg and Krishna Kavi

On October 10, 2017, the U.S. Food and Drug Administration (FDA) Commissioner Scott Gottlieb spoke at the Wall Street Journal Global Food Forum (Forum) and shed light on his views regarding food labeling.

Specifically, Dr. Gottlieb said that he wants FDA to take a closer look at the health claims on food packaging. He further expressed that FDA should take greater initiative in scrutinizing these claims because he is concerned that certain food manufacturers put claims on products as marketing techniques, rather than the products actually having substantiated consumer health benefits as stated in these claims, which is the regulatory requirement.

Also at the Forum, Dr. Gottlieb emphasized that FDA is looking at how to more uniformly define the terms “healthy” and “natural” on food packaging. These terms have been the subject of recent lawsuits, particularly in California, due to growing consumer health and labeling concerns.

Dr. Gottlieb also discussed the status of the Food Safety Modernization Act (FSMA), which we’ve discussed at length on this blog since it was signed into law by President Obama on January 4, 2011. The law provides FDA with heightened oversight of produce and imported foods, aiming to avert outbreaks of food-borne illnesses. According to Dr. Gottlieb, FDA has allowed companies more time to comply with some parts of the law, such as new produce inspections and monitoring of water supplies on farms. FDA has announced a similar compliance extension for the Nutrition Facts Label rule. However, Dr. Gottlieb said that FDA still intends on implementing these laws in the future.

There has been much speculation that Dr. Gottlieb is high on the president’s list to succeed Tom Price as the head of the U.S. Department of Health and Human Services (HHS), after Price’s recent resignation. When asked during the Forum whether he might be a candidate for HHS, Dr. Gottlieb said he can best serve the administration in his current role at FDA, but will serve the president in whatever capacity he is needed. To date, FDA has essentially been the only agency that has been successful in accomplishing objectives under this administration; if Dr. Gottlieb transfers from FDA to HHS, it will be interesting to see whether and how that changes.

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Food safety

Restaurant and convenience store trade groups sue NYC over menu labeling regulations

Cori Goldberg and Krishna Kavi

On July 14, 2017, the National Association of Convenience Stores, New York Association of Convenience Stores, Food Marketing Institute, and Restaurant Law Center (trade groups) filed a lawsuit against the New York City Department of Health and Mental Hygiene and its Commissioner Dr. Mary Travis Bassett, the New York City Board of Health, and the New York City Department of Consumer Affairs and its Commissioner Lorelei Salas (Departments) over the city's menu labeling regulations. The lawsuit is the *National Association of Convenience Stores et al v New York City Department of Health and Mental Hygiene et al*, case number 1:17-cv-05324, and is filed in the US District Court for the Southern District of New York.

The trade groups are seeking an injunction and declaratory relief that New York City's restaurant food labeling regulations, 24 NY City Rules & Reg. § 81.50(c), are pre-empted by federal law under the Supremacy Clause. The US Food and Drug Administration (FDA) issued menu labeling regulations in 2014 that

require restaurants and similar retail food establishments to provide calorie and other nutrition information for standard menu items. The FDA recently extended the compliance date for the regulations to May 7, 2018 to address industry concern and confusion regarding the regulations. The New York City regulations require menu labeling as well but differ from the FDA regulations in its earlier compliance date. Thus, the trade groups are challenging the Departments on pre-emption grounds due to the differences in the city regulations as compared to the federal regulations.

The New York City regulations were enacted in 2008, making New York City one of the first U.S. jurisdictions to require caloric information labeling. The federal government followed suit through its regulations, enacted under the Affordable Care Act, in 2014. The complaint states that while the New York City regulations were repealed and re-enacted in 2015 to match the federal regulations, the Departments have not continued to match their regulations with the federal rules, such

as with the extended compliance date. The complaint states that after the FDA announced its compliance deadline extension for its menu labeling regulations on May 1, 2017, New York City Mayor Bill de Blasio announced on May 18, 2017 that the City would still begin enforcing its regulations immediately. The complaint adds that the New York City Department of Health will begin issuing citations and fines for noncompliance under the city regulations on August 21, 2017.

The complaint states that industry faces large costs to comply with the city's regulations, which have been acknowledged by the FDA as being complex and confusing, hence the FDA's delay in implementation of its rules. Also, industry faces high costs in general in complying with the city's regulations now when the regulations and requirements may be substantially changed by the FDA come May 2018.

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Food safety

FDA extends compliance date for Nutrition Facts Label rule

Cori Goldberg and Krishna Kavi

On June 13, 2017, the US Food and Drug Administration (FDA) announced that it was extending the compliance date for the Nutrition Facts Label rule.

The FDA will provide the final details regarding the extension of the compliance date through a Federal Register Notice that it will publish at a later date.

The FDA released the final Nutrition Facts Label rule in May 2016. The compliance date was originally set as July 26, 2018 and an additional year was given to certain manufacturers with annual food sales of less than US\$10 million.

The FDA stated that it decided to extend the compliance date for the Nutrition Facts Label rule after it received concerns from industry.

For example, the Grocery Manufacturers Association (GMA) asked the US Department of Health and Human Services Secretary Tom Price

for the rule deadline to be extended to 2021. The GMA stated that the original compliance date for the rule was quickly nearing and there was still guidance needed from the FDA, such as whether certain ingredients in products could still be classified as fiber on the new panels.

FDA stated that it wanted to ensure that manufacturers affected by the rule had enough time to receive necessary guidance from FDA to comply with the rule and sufficient time to update for their products the nutrition facts panel labels. Furthermore, FDA explained that the extension of compliance time will decrease costs for industry and by giving industry more time to comply, this will also help reduce consumer confusion by minimizing the transition period during which both old and new labels will be on products in the market.

The extension to the compliance date for the Nutrition Facts Label rule is the latest of FDA rule extension under the

Trump Administration. In May, the FDA also extended the compliance date for the Menu Labeling rule by one year.

It is yet to be seen as to what the new compliance date will be for the Nutrition Facts Label rule. While some news sources reported 2021, the FDA has yet to provide a date—its extension was silent on a specific date.

Due to the uncertainty, industry should still continue to take efforts to update the Nutrition Facts labels on its products. The Health Law Pulse will continue to monitor updates regarding the Nutrition Facts Label rule.

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