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The EU and Russia seek to agree on measures to address African Swine Flu outbreak

The EU's Animal Disease Notification System (*i.e.*, ADNS) reported that, on 24 January 2014, two cases of African Swine Flu (hereinafter, ASF) in wild boars were identified in Lithuania. Following the outbreak, which appeared to originate from neighbouring non-EU countries where the disease was not contained, shipments of pork originating from Denmark, Germany and the Netherlands were reportedly rejected at the Russian border, despite no ban on EU pork having been formally adopted by Russia. ASF, which is most common at small farms and often spread by wild boars, is considered harmless to humans.

In response to the outbreak, the EU adopted a number of emergency measures and restrictions. These reportedly included intensified surveillance of wild boars and pigs, sending samples to EU reference laboratory, keeping pigs isolated on their holdings and banning the dispatch of live pigs, pig semen, ova and embryos, as well as exports of pork, from the infected areas. Lithuanian authorities were assisted and advised in such tasks by veterinary experts from the EU, Russia and Belarus, as well as from the World Organisation for Animal Health (formerly, *Office International des Epizooties*, hereinafter, OIE). In addition, consultations were held between the EU and Russia in order to agree on a set of measures providing for a satisfactory level of protection for both trading partners, while ensuring that trade flows in the goods at hand not be overly affected. Consultations appear to be still ongoing after the EU's initial '*regionalisation*' proposal, consisting of circumscribing the ASF-infected area to six Lithuanian regions (*i.e.*, Trakai, Salcininkai, Lazdijai, Varena, Alytus and Druskininkai), and therefore excluding them from certification for exports of live pigs and pork, was not acceptable for Russia.

'*Regionalisation*' is an instrument for pest and disease control based on the separation of pest- or disease-free and affected areas on the basis of epidemiological criteria. It allows for the safeguarding of international trade, inasmuch as it permits to concentrate resources where chances to control or eradicate a pest or disease are higher, while maintaining market access for the concerned products. In the field of animal health, '*regionalisation*' (or '*zoning*'), which is defined on a geographical basis, may adopt the form of '*compartmentalisation*' (*i.e.*, holdings are grouped on the basis of common management practices). Successful application of these principles requires enhanced surveillance, a certain degree of trust

between the importing and exporting Countries and strong cooperation between the concerned private operators and their government.

'*Regionalisation*' is referred to in Article 6 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement), which establishes that SPS measures be adapted to the characteristics of the area on the basis of a number of factors, including the level of disease prevalence, the eradication or control programmes in place, and the existence of relevant guidelines. Similarly, WTO Members must recognise the concepts of disease-free areas and areas of low disease prevalence, although this is made dependent on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of SPS controls. This provision is further clarified by a set of guidelines adopted by the SPS Committee and specifically addressing transparency, exchange of information, predictability and confidence and credibility between importing and exporting WTO Members when implementing Article 6 of the SPS Agreement. In addition, a series of standards on the principles of '*regionalisation*' and '*compartmentalisation*' developed by the OIE (*i.e.*, the organisation recognised by the WTO in animal health-related matters) are laid down in its Terrestrial Animal Health Code.

Even if not bound by the aforementioned guidelines and standards, commonly agreed measures between the EU and Russia to address the ASF outbreak will need to comply with the provisions of the SPS Agreement, which requires, in Article 2.2, that measures be necessary (*i.e.*, proportionate), that they be based on scientific principles and that they not be maintained without sufficient scientific evidence. Article 5 of the SPS Agreement further elaborates on these obligations by requiring, *inter alia*, that SPS measures not be more trade-restrictive than required to achieve the chosen level of protection (Article 5.6). In this regard, the EU (formerly, European Communities) noted, in a number of submissions before the SPS Committee, that it had flexibly, but '*systematically applied...regionalisation*' (deemed to cover also '*compartmentalisation*') within the meaning of Article 6 of the SPS Agreement, both in the animal and plant health areas, and both as an importing and an exporting Member. The EU also asserted that '*regionalisation*' may be greatly beneficial to developing countries where their overall health status does not meet the EU's required level of protection, since it may allow them to export to the EU from certain areas.

In cases where plant health is at stake, '*regionalisation*' is translated into the establishment of '*protected zones*', which are exposed to particular risks and thus require special protection. '*Protected zones*' may be established in order to protect an area from a harmful organism already established in other parts of the EU, as well as in instances where there is danger that an organism not established in the EU may do so. Recently, the EU adopted emergency measures to prevent that citrus black spot (*i.e.*, CBS) disease from South Africa enter and spread into the EU (see Trade Perspectives, Issue No. 1 of 10 January 2014). No '*protected zones*' were established and import restrictions (arguably, tantamount to an EU import ban) were uniformly made effective throughout the territory of the EU. To the extent that the CBS disease affects fruits' appearance, but is harmless to humans, it appears that the EU's concerns mainly related to the economic impacts of the hypothetical entry and establishment of the CBS disease on EU citrus-producing areas. Although the abolition of controls, including veterinary and phytosanitary checks, at EU Member States' borders (due to the EU's internal market), may justify that this type of measures be uniformly applied in the EU, the argument could be made that the establishment of specific '*protected zones*' within the EU (*i.e.*, where citrus fruits are cultivated) could, possibly, have allowed for the adoption of less trade-restrictive measures *vis-à-vis* imports from South Africa.

Issues connected to the outbreak of ASF in Lithuania were reportedly discussed by EU Member States, as gathered in the Animal Health and Welfare section of DG SANCO's Standing Committee on the Food Chain and Animal Health (*i.e.*, SCFCAH) within the framework of its meeting held on 6-7 February 2014. In particular, the SCFCAH was set to

exchange views, as well as to possibly deliver an opinion on a draft Commission Implementing Decision, concerning *interim* protective measures and a possible financial contribution from the EU to secure surveillance and other emergency measures in certain areas of the EU against ASF. It remains to be seen whether the outcome of the SCFCAH's meeting plays a role in the result of consultations between the EU and Russia. Measures agreed by the two trading partners, regardless of their scope, look poised to have significant trade repercussions in the relevant sector. It is noted that, in 2013, Russia reportedly imported 55% of its pork (338,000 tonnes), including 96% of pork fat (253,000 tonnes) and offal (95,000 tonnes), from the EU. In this light, concerned companies are heavily encouraged to closely monitor any development, as well as to ensure that communications with their relevant authorities are articulated and fluent.

Investor-to-state dispute settlement provisions in investment agreements

The EU Trade Commissioner, Karel de Gucht, recently announced that the EU Commission will open public consultations on the investment protection provisions to be included in the Transatlantic Trade and Investment Partnership (hereinafter, TTIP) between the EU and the US. The news comes following increased interest from the public regarding the potential inclusion of investor-to-state dispute settlement (hereinafter, ISDS) provisions in the agreement.

Investment provisions in international agreements typically deal with market liberalisation and protection of investors. Regarding the protection of investors, the agreements focus on four areas. Firstly, the principles of '*most-favoured nation*' and '*national treatment*' are included so as to prohibit countries from discriminating against foreign investors. Secondly, the agreements protect investors from unfair expropriation (*i.e.*, the seizure of assets) by governments in countries where they invest. Thirdly, the agreements require countries to provide '*fair and equitable treatment*' to foreign investors. Lastly, provisions are usually included in order to restrict the ability of a host government to block the transfer of capital by a foreign investor. However, problems with the practical ability for investors to use the intended protections of investment agreements has led to the increased inclusion of ISDS mechanisms. The emergence of ISDS was intended to ensure that governments would comply with the investment protection obligations they had agreed to. Additionally, in situations where a separate state-to-state dispute settlement mechanism is available, ISDS allows investors an avenue of recourse when their own government is unable or unwilling to bring a dispute due to a lack of resources or political considerations. ISDS also allows for monetary remedies directly to the affected investor, whereas state-to-state disputes allow only for an obligation to remove the inconsistent measures. As a result, ISDS provides some level of assurance to investors and encourages investment in foreign markets.

Over time, the perceived shortcomings of ISDS mechanisms have created momentum for reform, and some recent international investment agreements have attempted to address such specific concerns. ISDS is also highly debated in a number of ongoing trade and investment negotiations (*e.g.*, the Trans-Pacific Partnership agreement, hereinafter, TPP). The EU has used the Comprehensive Economic and Trade Agreement (hereinafter, CETA) with Canada to improve upon past ISDS provisions contained in EU Member States' bilateral investment treaties. One concern often raised regarding ISDS has been the failure to define the term '*fair and equitable treatment*'. As a result, the language has been applied to situations that it was arguably not intended to address. In the CETA, the EU and Canada provide precise definitions of the term '*fair and equitable treatment*' so as to provide clarity and consistency in future disputes, as well as clarifications on what constitutes '*indirect expropriation*'. For arbitration proceedings, the EU has also addressed concerns of inconsistency and alleged arbitrator bias by including the opportunity to appeal initial decisions and increased conflict of interest provisions for arbitrators, respectively. The EU's

counterpart in the TTIP negotiations, the US, is also negotiating ISDS provisions in the TPP. Though draft texts of those provisions are not publicly available, reports indicate that similar clarifications are being included, but that some parties are attempting to exchange increased market access, in areas such as agriculture, for sectoral exclusions in ISDS.

In documents and statements released, the EU has maintained that its improved approach to ISDS is present in the TTIP. Many concerns raised against ISDS tend to be more fundamental disagreements with its use at all, though many appear more concerned with assurances that governments will not be barred from passing laws that address certain public policy issues. The EU appears to have addressed these concerns and it has maintained that it will continue to do so in the future. Though there have been legitimate shortcomings with ISDS applied under past agreements, it appears that those imperfections can be sufficiently addressed by clarifying language and concepts from the agreements. Removing ISDS entirely or even just sectorally with exclusion lists will likely have a significant negative impact on cross-border investment. Private parties must continue to enjoy direct protection for their investments to be encouraged and attracted. Arguably, countries should reject or discourage certain investments, if made in sectors that collide with key national policy objectives, rather than hypocritically allowing them (or even attracting them), only to then diminishing or negating private investors' rights to see their investments and proprietary rights protected through ISDS. Interested parties should take advantage of the public consultations to gain knowledge on the clarifications that the EU and the US are including in the TTIP regarding investment protection, but also to make sure their interests are known and properly accounted for. ISDS must continue to be an asset of international agreements and not become prisoner of fundamentalist ideologies and generalisations.

The EU Parliament adopts a resolution on food fraud

On 14 January 2014, the EU Parliament adopted, by 659 votes to 24 (with 8 abstentions), a *Resolution on the food crisis, fraud in the food chain and the control thereof* (hereinafter, the Resolution) drafted by the *Rapporteur* Esther De Lange of the EU Parliament's Committee on the Environment, Public Health and Food Safety.

The Resolution stresses the need for the EU to adopt a definition of '*food fraud*'. It suggests that policies and controls should widen their focus from health and safety only to food fraud, and that EU Member States should establish food fraud penalties that are at least twice the estimated economic gain sought by the fraudster, to prevent a recurrence of incidents like those surrounding horsemeat last year.

The Resolution addresses four main points: (i) the general principles of EU food law, in accordance with *Regulation No. (EC) 178/2002 on general principles and requirements of food law*, prohibiting the marketing of unsafe food along with fraudulent practices, the adulteration of food, and any other practices that may mislead the consumer; (ii) *Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods* and *Regulation (EU) No. 1169/2011 on the provision of food information to consumers* laying down detailed provisions in relation to the ban on misleading advertising and labelling practices; (iii) the fact that the EU regulatory framework in place for food safety and the food chain has provided a high level of food safety for EU consumers until now, but that the current legislation is still fragile and not always reliable and that, therefore, there is a need for improvements on the ground; and (iv) at the same time, the fact that recent food fraud cases have damaged consumers' trust in the food chain, having a negative impact on the agro-food sector, as these scandals damage the overall image of this key sector of the EU economy. To this end, restoring the confidence of consumers of European agro-foods, both inside and outside the EU, is of paramount importance.

In fact, food safety and the interests of consumers have always been central to the work of EU legislators. In addition to this, the (related, but separate) issue of food fraud has been gaining more and more attention in recent years, as a result of cases of fraudulent labelling of foods and other food frauds that have impacted the EU food chain. Recent cases of fraud include: the marketing of horsemeat as beef and the marketing of the meat from horses treated with *phenylbutazone* as edible horse meat; the marketing of ordinary flour as organic flour, of battery cage eggs as organic eggs, and of road salt as food salt; the use of methanol-contaminated alcohol in spirits; the use of dioxin-contaminated fats in animal feed production; and the mislabelling of fish species and seafood products. These incidents seem to indicate that there might be a continued or structural problem. These cases of food fraud have already had a negative impact on consumers' trust in the food chain, creating a major paradox: food is safer than ever, yet consumers' trust is low.

With the current EU legislative framework being largely focused on food safety, the EU has not developed a generally-acknowledged definition of food fraud. The only general guideline can be found in Regulation No. (EC) 178/2002, which states that the labelling, advertising, presentation and packaging '*shall not mislead consumers*', although in practical terms, the application of this provision varies largely among EU Member States and the number of controls in this area are limited. As a result, food fraud remains largely undetected, especially when there are no public health or food safety implications. Therefore, the Resolution establishes that a definition of food fraud must be established. Although public health and food safety remain of the highest priority, the Resolution suggests that the EU Commission and EU Member States widen their focus, policies and controls from health and safety only to include food fraud as well.

In the US, the following definition of food fraud has been developed in the legal literature: '*Food fraud is a collective term used to encompass the deliberate and intentional substitution, addition, tampering, or misrepresentation of food, food ingredients, or food packaging; or false or misleading statements made about a product for economic gain*'. Drawing on from this definition, the key characteristics of food fraud are: (i) non-compliance with food law and/or misleading the consumer; (ii) which is done intentionally; and (iii) for reasons of financial gain.

According to the Resolution, different types of food fraud include adulteration, substitution, tampering and counterfeiting. Products most at risk include fish, olive oil and organic foods, but also milk, grains, honey and maple syrup, coffee and tea, spices (such as saffron and chilli powder), wine and certain fruit juices. According to press reports, the Spanish Superior Council of Scientific Investigations (CSIC, in its Spanish acronym), which participates in the EU-funded '*Labelfish*' project, has revealed that, *inter alia*, 25% of fresh or chilled tuna are mislabelled (*i.e.*, the DNA of the fish does not correspond to the species tuna on the label).

Further to defining food fraud, the Resolution also calls for the enhancement of the Food and Veterinary Office's role and resources in detecting food fraud cases and for EU Member States to cooperate more through Europol on cross-border investigations. Thirdly, official controls should aim at combating food fraud and competent authorities should always certify and scrutinise private control bodies that take over certain tasks of official controls. Rules for intermediary labelling and traders should also be reviewed. Fourthly, the food sector itself plays a key role. Private initiatives to set up anti-fraud programmes should be encouraged and a legal obligation for food business operators to report fraudulent behaviour in their sector to competent authorities could contribute to reveal more fraud cases at an early stage and limit the dangers to public health. Fifthly, the attitude of enforcement bodies should move from an administrative and veterinary approach towards a policing approach, which proves successful in a number of EU Member States, and should be based on risk-profiling. Lastly, sanctions should be increased to at least double the amount of the economic advantages sought through the food fraud and registrations of food business operators

should be withdrawn for repeat offenders. Whistleblowers working in the food industry, who report abuses to the authorities, should be protected.

Taking the definition of food fraud established in the US, (*i.e.*, (i) non-compliance with food law and/or misleading the consumer, (ii) which is done intentionally and (iii) for reasons of financial gain), a link can also be established to deceptive labelling campaigns driven by certain manufacturers and retailers, such as the '*palm oil-free*' campaigns and other '*negative labelling*' campaigns in which certain ingredients or nutrients are demonised, while products which do not contain these ingredients and nutrients are promoted. Such '*negative labelling*' campaigns arguably do not comply with food law (*i.e.*, the EU rules on labelling of food and misleading advertising), they often mislead consumers about the impact on, *inter alia*, human health, animal welfare, the environment and labour rights, and this is done intentionally by certain manufacturers and retailers for, presumably, if not ostensibly, reasons of financial gain (*i.e.*, increase of sales of products that do not contain the nutrient or ingredient being targeted in the negative). These '*negative labelling*' campaigns and marketing techniques are arguably illegal under several EU or EU Member States' laws, particularly when falling within nutritional contexts or if based on unsubstantiated and deceptive claims, but the argument must be made that the EU legislator should also consider regulating them as instances of food fraud if the test of the US definition of '*food fraud*' is met.

The EU Parliament's Resolution will now be forwarded to the Council and the EU Commission. In view of the overwhelming Parliament majority that adopted it, the EU Commission will likely come under pressure to propose some of the recommendations in the Resolution as formal legislation.

Recently Adopted EU Legislation

Market Access

- [Commission Implementing Decision of 5 February 2014 extending the validity of Decision 2006/502/EC requiring Member States to take measures to ensure that only lighters which are child-resistant are placed on the market and to prohibit the placing on the market of novelty lighters](#)

Customs Law

- [Commission Implementing Regulation \(EU\) No. 76/2014 of 28 January 2014 amending Regulation \(EC\) No. 684/2009 as regards the data to be submitted under the computerised procedure for the movement of excise goods under suspension of excise duty](#)

Food and Agricultural Law

- [Commission Regulation \(EU\) No. 97/2014 of 3 February 2014 amending Annex III to Commission Implementing Directive 2014/19/EU of 6 February 2014 amending Annex I to Council Directive 2000/29/EC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community](#)

- [Regulation \(EC\) No. 110/2008 of the European Parliament and of the Council on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks](#)
- [Commission Regulation \(EU\) No. 98/2014 of 3 February 2014 amending Annexes II and III to Regulation \(EC\) No. 110/2008 of the European Parliament and of the Council on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks](#)
- [Council Decision of 28 January 2014 on the conclusion of the revised Memorandum of Understanding with the United States of America Regarding the Importation of Beef from Animals Not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Union](#)
- [Revised Memorandum of Understanding with the United States of America Regarding the Importation of Beef from Animals Not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Union](#)
- [Commission Implementing Decision of 27 January 2014 concerning certain interim protective measures relating to African swine fever in Lithuania](#)

Other

- [Council Decision of 28 January 2014 on the conclusion of the Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Community, on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other hand](#)
- [Council Regulation \(EU\) No. 43/2014 of 20 January 2014 fixing for 2014 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, to Union vessels, in certain non-Union waters](#)

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