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WTO SPS Committee Members fail again to advance their work relating to private standards

At a meeting of the WTO Committee on Sanitary and Phytosanitary Measures (hereinafter, SPS Committee) on 25-26 March 2014, WTO Members continued discussions relating to private standards for food safety and animal and plant health, but failed to resolve any issues. WTO Members have raised concerns regarding private standards for almost 9 years, yet little progress has been made.

Within the context of the WTO and SPS measures, the issue first arose in June 2005 when Saint Vincent and the Grenadines, with support from Jamaica, Peru, Ecuador and Argentina, complained at an SPS Committee meeting about the private standards for bananas and other agricultural products set by supermarkets and private retailers in the EU (then, the "*European Communities*"). Issues relating to private standards continued to be raised, and in July 2008 the SPS Committee circulated a questionnaire seeking proposals on what should be done. The 30 WTO Members that replied to the questionnaire formed an *ad hoc* working group, which met seven times between October 2008 and October 2010 (for related discussion, see Trade Perspectives, Issue No. 14 of 16 July 2010). Eventually, on 30-31 March 2011, the SPS Committee adopted a report containing five "*actions*" on how WTO Members might deal with private sector standards for food safety and animal and plant health. The "*actions*" included, *inter alia*, development of a working definition of private standards related to SPS, as well as interactions and co-operation with relevant international organisations and private sector standard setting bodies.

From a textual perspective, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement) provides little authority or guidance regarding private standards. Article 13, sentence three, provides that "*[m]embers shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, […], comply with the relevant provisions of this Agreement*". The operative term within this provision is thus what constitutes a '*non-governmental entity*', but this is still up for debate. However, on a broader, and arguably more important, level, WTO Members differ in their opinions of whether private standards fall within the scope of Article 13 at all. In 2013, China and New Zealand submitted proposed definitions of the term '*private standards*', which differed greatly, but they continued working on a joint proposal for a working definition of the term. Following an SPS Committee meeting on 16-17 October

2013, it was announced that China and New Zealand had produced a compromised draft definition and were in the process of working with other WTO Members to draft a definition that could be accepted by the entire SPS Committee. The current proposed definition is, "*[a]n SPS-related private standard is a written requirement or a set of written requirements of a non-governmental entity which are related to food safety, animal or plant life or health and for common and repeated use*". An optional footnote to the definition states, "*[t]his working definition or any part of it shall be without prejudice to the rights and obligations of Members under the [SPS Agreement] or the views of Members on the scope of this Agreement*". At the most recent SPS Committee meeting on 25-26 March 2014, some Members were not able to accept the draft.

In order to attempt to make some negotiating progress, the Members of the Committee did agree to look at how other international bodies define private standards. The issues relating to regulation of private standards have dragged on for almost 9 years. Reportedly, at the most recent SPS Committee meeting, China maintained that it would be "*disaster*" if a definition is not agreed upon soon. Additionally, it was reported that China's concerns were shared by El Salvador, India, Ecuador and Belize, which is said to be concerned for its papaya and citrus exporters. As the focus of market access has shifted from tariff measures to non-tariff measures, private standard requirements imposed by retailers are one of many (*de facto*, if not *de jure*) non-tariff barriers that can create additional unjustified costs for exporters when those costs are not justified for SPS reasons. The lack of harmonised private standards within the same importing country creates unnecessary additional compliance costs for businesses. At the same time, however, it is clear that, where no Government entanglement exists or where no delegated governmental authority (even implied) is traceable, private standards are part of the way in which free markets operate and economic operators interact. Whether the WTO should try to regulate this non-governmental domain is highly debatable.

'*Gluten-free*' labelling on foodstuffs in the EU and related dietary issues of '*free from*' labels

Regulation (EU) No. 609/2013 of the European Parliament and of the Council, on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control, requires a change of legal base for the regulation of labelling of foodstuffs as '*gluten-free*'. It also calls on the EU Commission to consider how to ensure that people that are intolerant to gluten are adequately informed of the difference between a food that is specially produced, prepared and/or processed in order to reduce the gluten content of one or more gluten-containing ingredients and other food that is made exclusively from ingredients naturally free of gluten. Finally, Regulation (EU) No. 609/2013 calls for the adoption of harmonised rules on '*lactose-free*' claims. In addition, there is an ongoing trend in the EU to label foodstuffs as '*free from*', which is understood by many consumers as implying that these products are a healthier choice.

Article 2(b) of *Commission Regulation (EC) No. 41/2009, concerning the composition and labelling of foodstuffs suitable for people intolerant to gluten*, defines '*gluten*' as a "*protein fraction from wheat, rye, barley, oats or their crossbred varieties and derivatives thereof, to which some persons are intolerant and which is insoluble in water and 0,5 M sodium chloride solution*". People with celiac disease suffering from a permanent intolerance to gluten are considered a specific group of the population, which needs foodstuffs intended for particular nutritional uses that, owing to their special composition or manufacturing processes, are intended to satisfy their particular nutritional requirements. The food industry has over time developed a range of products presented as '*gluten-free*' or similar terms. Differences between national provisions in EU Member States concerning the conditions for the use of such product descriptions have resulted in the adoption of harmonised rules on the use of

the claims '*gluten-free*' and '*very low gluten*' in Article 3 of Regulation (EC) No. 41/2009, which sets out that foodstuffs for people intolerant to gluten, consisting of or containing one or more ingredients made from wheat, rye, barley, oats or their crossbred varieties, which have been especially processed to reduce gluten, must not contain a level of gluten exceeding 100 mg/kg in the food as sold to the final consumer. Paragraph 2 of Article 3 establishes that the labelling, advertising and presentation of such products must bear the term '*very low gluten*' and that they may bear the term '*gluten-free*' if the gluten content does not exceed 20 mg/kg in the food as sold to the final consumer.

Regulation (EU) No. 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers (hereinafter, the FIR) sets out rules on information to be provided for all food (including non-prepacked food), on the presence of ingredients, such as gluten-containing ingredients, with a scientifically proven allergenic or intolerant effect in order to enable consumers, particularly those suffering from a food allergy or intolerance such as gluten-intolerant people, to make informed choices which are safe for them. Prior to the FIR, only labelling rules for allergenic ingredients have been established in general EU food labelling law. Requirements for the labelling of ingredients with an intolerant effect were set out in EU rules of foodstuffs for particular nutritional uses. Although the symptoms of both food allergies and food intolerances can be similar, important differences characterise them. In the case of a food allergy, it is the immune system that reacts to a particular substance; with a food intolerance, it is the body's metabolism that functions poorly. A food intolerance occurs when the body cannot properly digest a food or food component. People with an intolerance often can tolerate small amounts of the food or food component without symptoms. During an allergic reaction, however, the body produces anti-bodies that deactivate the allergen to remove it from the body. In simple terms, an allergy is "*immunity gone wrong*", whereby a normally harmless substance is perceived as a threat and is attacked by the body's immunological defence system. Allergies often provoke more toxic reactions than intolerances do. As it is impossible for food manufacturers to know customer-specific allergies or intolerances, individual consumers who have these identified allergies or intolerances must, themselves, take care of them. They are unable to do that, however, unless they have full and complete information about the foodstuffs they are ingesting.

For the sake of clarity and consistency, the EU has established, in Regulation (EU) No. 609/2013, that rules on the use of the statements '*gluten-free*' and '*very low gluten*' should be in the future regulated under the FIR, in particular under Article 21 of the FIR on the labelling of certain substances or products causing allergies or intolerances listed in Annex II to the FIR. Regulation (EU) No. 609/2013 also sets out that the legal acts to be adopted pursuant to Regulation (EU) No. 1169/2011, which are to transfer the rules on the use of the statements '*gluten-free*' and '*very low gluten*', as contained in Regulation (EC) No. 41/2009, must ensure at least the same level of protection for people that are intolerant to gluten as currently provided for under Regulation (EC) No. 41/2009. That transfer of rules should be completed before 20 July 2016. Furthermore, the EU Commission must consider, according to Recital 41 of Regulation (EU) No. 609/2013, how to ensure that those who are intolerant to gluten are adequately informed of the difference between a food that is specially produced, prepared and/or processed in order to reduce the gluten content of one or more gluten-containing ingredients and other food that is made exclusively from ingredients naturally free of gluten. At the international level, the Codex Standard for Foods for Special Dietary Use for Persons Intolerant to Gluten not only addresses the use of '*gluten-free*' labels, but it also sets requirements for the use of the statement '*this food is by its nature gluten-free*'. An equivalent provision must be adopted in the EU before 20 July 2016. After the adoption of *Commission Delegated Regulation (EU) No. 1155/2013 amending the FIR as regards information on the absence or reduced presence of gluten in food*, Article 36(3)d) of the FIR provides that the EU Commission shall adopt implementing acts in relation to the voluntary information on the absence or reduced presence of gluten in food.

In this context, *Commission Directive 2006/141/EC on infant formulae and follow-on formulae* prohibits the use of ingredients containing gluten in the manufacture of such foodstuffs. The German Working Group of Experts of Food Chemistry of the Federal States and the Federal Office for the Protection of Consumers and Food Security (the *Arbeitskreises Lebensmittelchemischer Sachverständiger der Länder und des Bundesamtes für Verbraucherschutz und Lebensmittelsicherheit*, or ALS, in its German acronym) was asked how a '*gluten-free*' claim can be made against this background and how the indication of '*gluten-free*' can be formulated in the future on such foods. In its opinion No. 2011/57, the ALS held that a '*gluten-free*' claim on infant *formulae* and follow-on *formulae* is misleading in accordance with §11 Section 1, Sentence 2, No. 3 of the German Food and Feed Law (LFGB in its German acronym) as it constitutes an advertisement with a certainty. The ALS stated that consumers can be informed, for example, through statements such as "*produced without gluten-containing ingredients according to the law*".

Recital 42 of Regulation (EU) No. 609/2013 acknowledges that labelling and compositional rules indicating the absence or reduced presence of lactose in food are currently not harmonised at EU level. For the sake of clarity and consistency, the establishment of rules on the use of statements indicating the absence or reduced presence of lactose in food should be regulated under the FIR, taking into account the Scientific Opinion of the European Food Safety Authority of 10 September 2010 on lactose thresholds in lactose intolerance and *galactosaemia*.

Informing consumers about ingredients that cause allergies or intolerances is extremely important, but it should also be noted that there is a current trend in food manufacture to '*demonise*' certain nutrients and ingredients by claiming that the foodstuffs are '*free from*' them, be it gluten, palm oil or aspartame or many others. The requirements for labelling a foodstuff as '*gluten-free*' are strictly harmonised at EU level, but it is only one of few examples of the '*free from*' trend, which are regulated, together with labels indicating the absence of certain nutrients, *inter alia*, fat or sugar in EU legislation on nutrition labelling.

Life without gluten is not cheap. The Spanish Federation of Associations of Celiacs (FACE) estimates that this year families with at least one member suffering from intolerance to gluten spend an average of about EUR 1,600 more than households in which no one suffers from such intolerance. It has been reported that, despite this additional cost, more and more people (that suffer no intolerance) buy gluten-free products following a trend, fuelled by actresses, singers and other celebrities, who praise gluten-free diets as healthier and a means to lose weight. However, avoiding gluten does not help to lose weight and is not healthier if there is no intolerance. It can also cause nutritional deficiencies in the body, such as the lack of fibre. It has also been reported that gluten-free products are no longer clustered in specific areas or specialty stores, but are presented in supermarket shelves together with '*regular*' offers. It appears that part of the food industry is exploiting a new demand for people who are not celiac, but who prefer to eat without gluten. It can be concluded that, while for some time product marketing was championing the label '*light*', this no longer sells as well as in the past and the trend is now increasingly to resort to '*natural*', '*healthy*' and the '*free-from*' labels. Regulators ought to urgently step in and address market distortions and deceptive or fraudulent practices that, in the name of marketing, confuse consumers and result in unfair trading practices that distort competition. The perfect and unfortunate example of this is the proliferation, especially in France, of '*palm oil free*' labels, which, when made in a nutritional context, are arguably nutrition claims and, as such, to be considered illegal under EU law.

Discrepancies among EU Member States remain in relation to mandatory country of origin indication

On 15 April 2014, the Plenary session of the EU Parliament voted on a draft regulation comprised within the so-called '*Product safety and market surveillance package*', which encompasses a number of legislative and non-legislative measures proposed by the EU Commission with the aim of improving consumer products' safety and strengthening market surveillance in the EU. On the basis of the report drafted by the parliamentary committee on the Internal Market and Consumer Protection (*i.e.*, the IMCO Committee), the EU Parliament adopted, at first reading, the *Proposal for a Regulation of the European Parliament and of the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC* (hereinafter, the proposed regulation on consumer product safety). In essence, this instrument seeks to clarify the regulatory framework for consumer products' safety, which currently overlaps with provisions contained in numerous pieces of legislation.

The proposed regulation on consumer product safety was tabled by the EU Commission on 13 February 2013. It is set to replace the current '*General Product Safety Directive*' (*i.e.*, *Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety*) and builds upon the general principle that all consumer products placed on the EU's market must be '*safe*'. Broadly, the proposed measure applies to new, used or re-conditioned consumer products, whether originating in the EU or in a third country, with a number of notable exceptions (*inter alia*, medicinal products, food, materials intended to come into contact with food, and feed). In order to ensure compliance with the general safety requirement, the draft regulation envisages a number of rules to assess products' safety; and also lays down obligations for economic operators involved in products' supply chains (*i.e.*, manufacturers, importers and distributors), where they are not subject to sector-specific obligations. In addition, the draft regulation includes provisions favouring the use of EU-wide standards to support the implementation of the general safety requirement.

Arguably, one of the most outstanding aspects of the proposed regulation is the requirement that, in order to reinforce products' traceability, all products bear an indication of their origin. According to the EU Commission, mandatory indication of the country of origin will help identify the products' place of manufacture, which stands to be particularly useful in instances where cooperation on issues related to product safety between the EU and the authorities of the country of origin is deemed necessary, but the available contact information of the economic operators involved is insufficient. In relevant part, Article 7 of the proposed regulation on consumer product safety foresees that the country of origin be determined according to the rules on non-preferential origin (based on '*wholly obtained*' or '*last substantial transformation*' criteria) laid down in the EU's Customs Code. Products originating in an EU Member State may simply bear the indication "*made in the EU*" or specify the relevant EU Member State of origin.

Although the mandatory indication of origin gave rise to animated debates at the EU Parliament's committees, in its report of October 2013, the IMCO Committee recalled that several EU trading partners already require that origin be indicated in products' labelling and customs declarations. A similar observation was made by the Committee on International Trade (*i.e.*, the INTA Committee), which acknowledged that indication of origin has a vital role in combating counterfeiting and in identifying dangerous goods to be withdrawn from the EU's market. The INTA Committee also indicated that several trading partners of the EU (including Canada, Japan, Mexico and the US) have more stringent rules of origin in place for all goods, including for products imported from the EU. This Committee also clarified that, to the extent that the EU is currently negotiating bilateral agreements that foresee mandatory indication of origin, the requirement in the proposed regulation will contribute to a more balanced and fair market and avoid disparities in treatment that could amount to trade obstacles.

Despite the adoption of the proposed regulation by the EU Parliament, fundamental discrepancies remain among EU Member States concerning the adequacy of the country of origin indication requirement. A report from the EU Council's Presidency of November 2013 pointed out that, while a number of EU Member States considered that this provision would improve the traceability of products and consumer information, other EU Member States argued that a mandatory country of origin requirement would be overly-burdensome for economic operators and was not justified. It appears that one of the reasons underlying this internal division relates to the fact that no impact assessment was conducted in relation to the country of origin indication requirement. In addition, sources suggest that positions within the EU Council reflect a polarised division between net exporting and importing EU Member States.

Disagreements on a compulsory country of origin indication are not new to the EU Membership. A *Proposal for a Council Regulation on the indication of the country of origin of certain products imported from third countries*, which was adopted by the EU Commission as early as 2005, was withdrawn in April 2013, on grounds that it had become obsolete. This draft measure was not primarily directed at consumer safety and applied to a much narrower scope of products (mostly textiles, footwear, leather, ceramics, glassware, jewellery, furniture and brushes, and exclusively where originating from non-EU countries) than the proposed regulation on consumer product safety. Despite the obvious differences, in that case EU Member States were also unable to reach an agreement on whether '*made in*' marking would contribute to facilitate consumers' choices, reduce fraud, improve consumer information and strengthen competitiveness of EU products (as intended by the EU Commission); or, rather, whether such requirement would pose administrative burdens and additional costs to traders and hide protectionist intents facilitating boycotts on products from certain third countries (see Trade Perspectives, Issue No. 21 of 13 December 2009).

Given the lack of consensus among EU Member States, the EU Council was not able to launch informal inter-institutional negotiations to reach an agreement on the proposed regulation on consumer product safety by the end of the current mandate. Nonetheless, the texts adopted by the EU Parliament's Plenary will serve as a basis for future negotiations among EU Institutions. Although the results of the upcoming EU elections certainly provide for a renewed opportunity for the EU's country of origin indication requirement to be approved, economic operators and interested parties must bear in mind that efforts to maintain a fluent and transparent dialogue with the relevant governmental instances must be equally renewed.

Recently Adopted EU Legislation

Market Access

- *Council Decision of 14 April 2014 on the conclusion of the Framework Agreement on Comprehensive Partnership and Cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part, as regards matters related to readmission*

- *Council Implementing Decision of 14 April 2014 as regards the extension of the period of entitlement for audiovisual co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*

- *Framework Agreement on comprehensive partnership and cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part*

Trade Remedies

- *Commission Implementing Decision of 16 April 2014 concerning exemptions from the extended anti-dumping duty on certain bicycle parts originating in the People's Republic of China pursuant to Commission Regulation (EC) No. 88/97 (notified under document C(2014) 2474)*

Customs Law

- *Regulation (EU) No. 374/2014 of the European Parliament and of the Council of 16 April 2014 on the reduction or elimination of customs duties on goods originating in Ukraine*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) No. 428/2014 of 25 April 2014 adopting exceptional support measures for the pigmeat market in Lithuania and amending Implementing Regulation (EU) No. 324/2014 adopting exceptional support measures for the pigmeat market in Poland*

- *Commission Regulation (EU) No. 426/2014 of 25 April 2014 amending Annex II 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*

- *Commission Implementing Decision of 24 April 2014 concerning a Union financial contribution towards surveillance and other emergency measures implemented in Estonia, Latvia, Lithuania and Poland against African swine fever (notified under document C(2014) 2551)*

- *Commission Implementing Decision of 24 April 2014 on measures to prevent the introduction into and the spread within the Union of harmful organisms as regards certain fruits and vegetables originating in India (notified under document C(2014) 2601)*

Other

- *Commission Implementing Regulation (EU) No. 441/2014 of 30 April 2014 amending Regulation (EC) No. 29/2009 laying down requirements on data link services for the single European sky*

- *Regulation (EU) No. 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions*

- *Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC*

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