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The EU requests WTO consultations with Russia over measures linked to the African Swine Fever outbreak

On 8 April 2014, the EU filed a request for WTO consultations with Russia concerning certain measures adopted by the latter affecting the importation of live pigs, pork and other pig products from the EU. Broadly, the EU claims that Russia has imposed WTO-inconsistent import restrictions (possibly amounting to an import ban) on the concerned products from the EU, alleging grounds connected to the recent outbreak of African Swine Fever (hereinafter, ASF) in wild boar in Lithuania and Poland.

The controversial measures at hand stem from four cases of ASF in wild boar that were identified in Lithuania and Poland in January and February this year, which appeared to originate from the prolonged presence of ASF in the western regions of Russia and Belarus. ASF is most common at small farms and it is often spread by wild boar. There are no vaccines or drugs available for ASF which, although harmless to humans, is considered one of the most dangerous diseases for pigs. Following the outbreaks, and in accordance with the applicable EU legislation (*i.e.*, *Council Directive 2002/60/EC of 27 June 2002 laying down specific provisions for the control of African swine fever and amending Directive 92/119/EEC as regards Teschen disease and African Swine Fever*), the affected areas in Lithuania and Poland were identified and '*regionalised*' (*i.e.*, subjected to a number of protective measures and restrictions). In relevant part, these measures included intensified surveillance of wild boars and pigs, sending samples to the EU's reference laboratory, keeping pigs isolated in their holdings and banning the dispatch of live pigs, pig semen, ova and embryos, as well as exports of pork, from the infected areas. National 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 (hereinafter, OIE).

Simultaneously, the EU and Russia maintained bilateral contacts 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 live pigs and pork products not be overly affected (see Trade Perspectives, Issue No. 3 of 7 February 2014). Nonetheless, the two trading partners were unable to agree on the measures to '*regionalise*' the affected areas in the EU and, in February and March, Russia notified the WTO Committee on Sanitary and Phytosanitary Measures (hereinafter, SPS Committee) of the adoption of emergency measures restricting imports of the concerned goods from Lithuania and Poland. The EU swiftly reacted to

Russia's notifications indicating, *inter alia*, that Russia's measures were disproportionate, more trade-restrictive than necessary and discriminatory. Further, the EU submitted that Russia's notifications were misleading, to the extent that Russia had imposed a ban that *de facto* applied to imports from the entire territory of the EU.

In its request for WTO consultations, the EU submits that restrictive measures in place in Russia appear to be inconsistent with several provisions of the WTO SPS Agreement and the GATT. In relevant part, the EU alleges that the Russian measures appear to violate Article 2.2 of the SPS Agreement, which provides that measures be necessary (*i.e.*, proportionate), that they be based on scientific principles and that they not be maintained without sufficient scientific evidence. This provision is further elaborated in Article 5 of the SPS Agreement, which the EU also considers to be violated by Russia. *Inter alia*, Article 5 of the SPS Agreement requires that SPS measures be based on an appropriate risk assessment and that they not be more trade-restrictive than required to achieve the chosen level of protection.

The EU also asserts that the restrictions maintained by Russia appear to be discriminatory and to constitute a disguised restriction to international trade, in contravention of Articles 2.3 and 5.5 of the SPS Agreement. In this respect, the EU takes stock of the fact that, while Russia did not accept the EU's '*regionalisation*' of the ASF-affected areas in Lithuania and Poland, it agreed to the '*regionalisation*' adopted by Belarus and Ukraine following ASF outbreaks in their territories over the past months. Along the same lines, the EU claims that discriminatory treatment also appears to arise in relation to Russia's failure to close its internal market despite the presence of ASF in its territory (where almost 600 cases of ASF in wild boar have been reportedly identified since 2007).

In a communication circulated within the WTO SPS Committee in March, Russia indicated that its emergency measures restricting imports from Lithuania and Poland were covered by Article 5.7 of the SPS Agreement which, on the basis of the precautionary principle, allows for the adoption of provisional SPS measures provided that (*inter alia*) there is insufficient scientific evidence. In its request for consultations, the EU expresses its disagreement and indicates that Russia appears to have failed to comply with the requirements under Article 5.7 of the SPS Agreement, including that the measures be adopted "*provisionally*".

Further, the EU considers that Russia appears not to have observed the rules on '*regionalisation*' laid down in Article 6 of the SPS Agreement, including that SPS measures be adapted to the characteristics of the area on the basis of a number of factors. In particular, the EU indicates that the level of ASF prevalence in geographically limited areas, as well as the existence of eradication and control programmes (according to the EU, implemented in accordance with the relevant OIE guidelines), appear to have been overlooked. Similarly, the EU submits that Russia appears not to recognise that the EU (excluding the duly '*regionalised*' ASF-affected areas) is a disease-free area or an area of low ASF prevalence, despite the EU having provided the necessary evidence to demonstrate that it qualifies as such.

In addition to the aforementioned alleged violations of the SPS Agreement (as well as a number of further alleged inconsistencies with procedural provisions of the same Agreement), the EU claims that the Russian restrictions appear to amount to a violation of the most-favoured nation and national treatment obligations (as embodied in Articles I:1 and III:4 of the GATT, respectively), as well as the prohibition of quantitative restrictions (laid down in Article XI:1 of the GATT).

In accordance with the rules of the WTO Dispute Settlement Understanding, the two trading partners will conduct consultations during no less than 60 days. Should they fail to reach a mutually agreed solution, the EU may request that a panel be established to assess the

measures at hand against the backdrop of WTO law. Throughout all stages of the proceedings, concerned businesses on both the EU and Russian sides are strongly advised to ensure that their interests are heard by their relevant governmental instances, inasmuch as it is formally Governments of WTO Members (and not private operators) that enjoy access to WTO dispute settlement. Considering that exports of pork products from the EU to Russia amounted to EUR 1.4 billion last year, it can be safely assumed that the outcome of this dispute will have a considerable impact on the relevant EU and Russian industries.

New developments regarding the regulation of foods intended for sportspeople in the EU

The regulation of foods intended for sportspeople will most likely undergo significant regulatory changes in the next two years, possibly including greater harmonisation at EU level. Currently, foods intended for sportspeople are considered in the EU as foods intended for particular nutritional uses (also known as PARNUTS or dietetic foods) and fall under same legal framework as, *inter alia*, foods for infants and young children or medical foods. On 19 July 2016, *Regulation (EU) No. 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control* (*i.e.*, the so-called EU Regulation on food for specific groups and hereinafter, Regulation (EU) No. 609/2013), comes into effect. Regulation (EU) No. 609/2013 is expected to bring important changes to the regulation of the sports nutrition sector in EU.

Besides the PARNUTS category description of "*food intended to meet the expenditure of intense muscular effort*", there is no definition of foods intended for sportspeople under EU law. Sports nutrition products are defined by the European Specialist Sports Nutrition Alliances (ESSNA), the trade association representing the interests of the sports nutrition sector across the EU, as "*products designed for and used by athletes, exercisers and sportsmen to improve their nutritional intake and/or some aspect of health, wellbeing, performance, muscle growth and/or recovery from exercise*." *Directive 2009/39/EC of the European Parliament and of the Council on foodstuffs intended for particular nutritional uses*, which remains in force until 19 July 2016 (when Regulation (EU) No. 609/2013 comes into effect), lays down general rules on the composition and preparation of foods that are specially designed to meet the particular nutritional requirements of the persons for whom they are intended (*i.e.*, vulnerable consumers, such as infants, young children, gluten intolerant and ill people).

Annex I A No. 5 of Directive 2009/39/EC indicates that specific rules will also be set out by EU legislation to cover foods intended to meet the expenditure of intense muscular effort, especially for sportsmen, which has yet to occur. However, the framework for foods for particular nutritional uses applies to foods intended for sportspeople. The majority of the substantive provisions laid down in Directive 2009/39/EC date back to 1977. Directive 2009/39/EC provides for general labelling requirements, including that such foods must bear an indication of their suitability for the nutritional purposes being claimed. The general compositional and labelling requirements laid down in Directive 2009/39/EC are complemented by a number of specific directives adopted pursuant to Article 4(1) of Directive 2009/39/EC, which are applicable to specific categories of food (*i.e.*, foods intended for use in energy-restricted diets for weight reduction; dietary foods for special medical purposes; processed cereal-based foods and baby foods for infants and young children; infant *formulae* and follow-on *formulae*).

The legislative framework for foods for particular nutritional uses is completed by rules concerning the composition and labelling of foodstuffs suitable for people intolerant to gluten; on infant *formulae* and follow-on *formulae* intended for export to third countries; and on

substances that may be added for specific nutritional purposes in foods for particular nutritional uses established in Annex I to *Commission Regulation (EC) No. 953/2009 of 13 October 2009 on substances that may be added for specific nutritional purposes in foods for particular nutritional uses* lists substances (*i.e.*, vitamins, minerals and amino acids) that may be added for specific nutritional purposes in foods for particular nutritional uses. The list of those substances was originally established by *Commission Directive 2001/15/EC of 15 February 2001 on substances that may be added for specific nutritional purposes in foods for particular nutritional uses* and, following requests submitted by interested parties, new substances have been evaluated by the European Food Safety Authority (hereinafter, EFSA). Consequently, that list has been completed and updated by Commission Regulation (EC) No. 953/2009.

As of 19 July 2016, all the "*sub-groups*" of foods for particular nutritional uses will be merged into Regulation (EU) No. 609/2013. The question is whether foods for sportspeople will continue to be defined as food for particular nutritional uses. The EU Commission's proposal, which led to Regulation (EU) No. 609/2013, suggested to leave foods intended for sportspeople out of the scope of the proposed Regulation on food for specific groups and to have them covered exclusively by general food legislation (and in particular the *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods*). The EU Parliament agreed with the EU Commission that these products should fall out of the scope of the Regulation, but called on the EU Commission to assess the need to review general food law in this regard. The Council agreed in its position to leave these products out of the scope of the proposed Regulation, but introduced amendments requiring the EU Commission to draft a report on the necessity, if any, of specific rules for these products with the possibility to accompany this report with a legislative proposal. The Council's request for a report was seen as a compromise (for more details, see Trade Perspectives Issue No. 14 of 12 July 2013). Therefore, Recital No. 32 of Regulation (EU) No. 609/2013 provides that, for food intended to meet the expenditure of intense muscular effort, especially for sportspeople, no successful conclusion could be reached as regards the development of specific provisions due to widely diverging views among the EU Member States and stakeholders concerning the scope of specific legislation, the number of subcategories of food to be included, the criteria for establishing compositional requirements and the potential impact on innovation in product development. It must be noted that, on the basis of requests submitted by food business operators, relevant claims for foods intended for sportspeople have been considered for authorisation in accordance with Regulation (EC) No. 1924/2006.

Regulation (EU) No. 609/2013 does, in fact, not introduce rules on foods for sportspeople. However, Article 13 of Regulation (EU) No. 609/2013 foresees that, by 20 July 2015, the EU Commission must, after consulting the EFSA, present to the EU Parliament and to the Council a report on the necessity, if any, of provisions for food intended for sportspeople. The consultation of the EFSA must take into account the report of 28 February 2001 of the Scientific Committee on Food on composition and specification of food intended to meet the expenditure of intense muscular effort, especially for sportspeople. The EU Commission must, in particular, evaluate whether provisions are necessary to ensure the protection of consumers. Article 13 of Regulation (EU) No. 609/2013 also establishes that such report may, if necessary, be accompanied by an appropriate legislative proposal. It is possible that the EU Commission will conclude that there is no necessity to establish special compositional and labelling rules for food intended for sportspeople. In that case, such foods would be regulated solely by general EU food legislation.

Over the last years, some EU Member States have issued warning messages in relation to substances in foods for sportspeople. *Inter alia*, the competent authorities of Denmark, Finland, France, Italy, the Netherlands, Malta, Spain, Sweden and the UK have reportedly issued warnings against the pre-workout and weight loss stimulant, DMAA

(*dimethylamylimine/methylhexanamine*), which is also on the World Anti-Doping Agency's (WADA) list of prohibited substances. Food intended for sportspeople is not always perceived well by the general public. Many people associate it with non-compliant and unsafe products for bodybuilders and other athletes, which are distributed via the internet and often come from outside the EU. ESSNA notes that it has been stated in the media on several occasions that sports nutrition products routinely contain banned substances, that their processing and production is unregulated and poorly managed, and that the basis for these assertions have been a few isolated incidents and the inclination of athletes to blame sports supplements for their positive drugs tests. The possible regulation (or not) of sportsmen food at EU level will continue to be a controversial matter in the next couple of years and beyond, depending on the EU Commission's report on that subject due by 20 July 2015. Interested parties are recommended to closely follow any development in this respect.

India raises concerns on the EU's measures affecting the importation of five fruits and vegetables

On 26 March 2014, EU Member State experts meeting at the Standing Committee on Plant Health (hereinafter, the SCPH) endorsed emergency measures proposed by the EU Commission to ban the import of five fruits and vegetables from India. At the India-EU Sanitary and Phytosanitary and Technical Barriers to Trade (hereinafter, India-EU SPS-TBT) working group in Brussels on 1 April 2014, India reportedly voiced its disagreement with the EU regarding the ban. The measures will come into force amid a period of what appears to be increasing restrictiveness by the EU on the importation of certain fruits and vegetables and has the potential to lead to numerous challenges at the international level.

Under EU law, restrictions on the importation of fruits and vegetables containing pests or diseases are governed by *Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community* (hereinafter, Council Directive 2000/29/EC). According to Article 16(2) thereof, an EU Member State is required to immediately take measures necessary to protect its territory and inform the EU Commission and the other EU Member States when "*consignments of plants, plant products or other objects from third countries [are] considered to involve an 'imminent danger' of the introduction or spread*" of harmful diseases (whether or not they are currently listed in Annex 1 or 2 of the directive). Then, as directed by Article 16(3) of Council Directive 2000/29/EC, the SCPH must examine the situation and adopt the necessary measures, if any. During 2013, 207 consignments of fruits and vegetables from India were denied entry into the EU due to the presence of *harmful organisms*, including in particular non-EU fruit flies. On 27-28 February 2014, the SCPH exchanged views on a draft Commission Implementing Decision on emergency measures in respect of certain fruits and vegetables originating in India. At the subsequent meeting on 26 March 2014, the SCPH voted in favour of the draft Commission Implementing Decision banning the importation of *Colocasia* sp (eddo, or "*taro*"), *Mangifera* sp (mango), *Momordica* sp (bitter gourd), *Solanum melongena* (eggplant) and *Trichosanthes* sp (snake gourd) from India, beginning on 1 May 2014. A revision of the decision will take place before 31 December 2015.

India appears to be concerned in part because the measure was endorsed just prior to the entry into force of new restrictions in India to tighten controls of fruit and vegetable exports, as agreed during prior discussions of the India-EU SPS-TBT working group. In mid-March, India's Agricultural Produce Export Development Authority (hereinafter, APEDA) reportedly issued an advisory to fruit and vegetable exporters to increase their quality controls. As of 1 April 2014, fruit and vegetables to be exported from India must be routed through APEDA-approved pack houses so that plant quarantine personnel can inspect, examine and test

export consignments. As a result, India is reportedly of the opinion that the EU ban was premature and instead should have waited for the results of the new SPS certification system.

The emergency measures present interesting issues of law at both EU and WTO levels. The SCPH relies on Article 16(3) of Council Directive 2000/29/EC, which references Article 16(2). One potential legal challenge could thus be whether or not an '*imminent danger*', as envisioned in Article 16(2), was present that would justify the ban, given the knowledge that India was set to introduce the new SPS certification system. Under WTO law, numerous provisions under the SPS Agreement are relevant. Generally, the SPS Agreement gives WTO Members the right to implement SPS measures necessary for the protection of human, animal or plant life or health, but, *inter alia* requires that such measures be necessary (*i.e.*, the least trade-restrictive), based on scientific principles and not maintained without sufficient scientific evidence. According to Article 5.6 of the SPS Agreement, WTO Members must ensure that "*measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility*". Additionally, under Article 10 of the SPS Agreement, WTO Members (like the EU) must take into account the developing country status certain countries (like India), which includes according longer time-frames for compliance for products of interest during the phasing-in of new SPS measures. Given that the rejected consignments used as a basis for the emergency measure occurred over the course of a year, and the draft Commission Implementing Decision was not voted on until 26 March 2014, India may have a reasonable claim that waiting an extra few weeks to observe the effectiveness of its new system would have had little relative negative impact on the EU and that there was little urgency (*i.e.*, imminence of the danger). Therefore, it appears that an argument could be made by India that the EU ban is not properly justified and in violation of the SPS Agreement, especially considering the leniency to be accorded to developing countries and the need for an imminent danger.

The EU's measures also come within the context of other information of which fruit and vegetable importers and exporters should be aware. There is some indication that the EU has been increasing its restrictiveness of fruit and vegetable imports as of late, most notably with the ban on *Citrus* fruit from South Africa (see Trade Perspectives, Issues 1 of 10 January 2014, 3 of 7 February 2014 and 5 of 7 March 2014). More recently, on 8 April 2014, the EU banned kinnow and mango from Pakistan, also due to non-compliance with sanitary and phytosanitary requirements. Interested parties should take into account and address the trade effects caused by these measures, including if necessary close coordination with their respective Government representatives before the EU and at the WTO. In fact, there is also the possibility that the EU's measures will spread distrust in other markets and threaten exporters' access in other parts of the world. Stakeholders should monitor the situation closely and seek legal assistance where necessary.

Recently Adopted EU Legislation

Trade Remedies

- *Council Implementing Regulation (EU) No. 391/2014 of 14 April 2014 terminating the partial interim review concerning the anti-subsidy measures on imports of biodiesel originating in the United States of America, as extended to imports consigned from Canada, whether declared as originating in Canada or not*

- *Council Implementing Regulation (EU) No. 392/2014 of 14 April 2014 terminating the partial interim review concerning the anti-dumping measures on imports of biodiesel originating in the United States of America, as extended to imports consigned from Canada, whether declared as originating in Canada or not*

- *Commission Implementing Regulation (EU) No. 360/2014 of 9 April 2014 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in the People's Republic of China and Russia, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No. 1225/2009*

Food and Agricultural Law

- *Commission Implementing Decision of 9 April 2014 amending the Annexes to Implementing Decision 2011/630/EU as regards animal health requirements relating to bluetongue and epizootic haemorrhagic disease (notified under document C(2014) 2256)*

- *Commission Implementing Regulation (EU) No. 354/2014 of 8 April 2014 amending and correcting Regulation (EC) No. 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No. 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control*

- *Commission Implementing Regulation (EU) No. 355/2014 of 8 April 2014 amending Regulation (EC) No. 1235/2008 laying down detailed rules for implementation of Council Regulation (EC) No. 834/2007 as regards the arrangements for imports of organic products from third countries*

Other

- *Commission Implementing Regulation (EU) No. 368/2014 of 10 April 2014 amending Regulation (EC) No. 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community*

- *Commission Regulation (EU) No. 358/2014 of 9 April 2014 amending Annexes II and V to Regulation (EC) No. 1223/2009 of the European Parliament and of the Council on cosmetic products*

- *Commission Delegated Regulation (EU) No. 382/2014 of 7 March 2014 supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for publication of supplements to the prospectus*

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