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Are the measures taken by the EC to combat the dairy crisis WTO compatible?

On 19 October 2009, the EC Council approved an extension of the period for buying butter and skimmed milk powder into public intervention storage. In addition, the EC Agriculture Commissioner also proposed to inject 280 million EUR in the EC dairy industry. On 5 October 2009, it was announced that EC Council would meet to try and find a solution for the deteriorating dairy market situation. Recently, more than 60,000 EC dairy farmers stopped or reduced their milk deliveries and more than 350,000 litres of milk have been spilled in protest across the EC. The direct causes of this crisis are to be found in the decreasing dairy market prices, which farmers claim can no longer cover the production costs, as these remain high.

With respect to the possible subsidies worth 280 million EUR that would be injected into the EC dairy industry, the last word has not been said yet. It is up to the EC Council to approve this measure. Furthermore, on 19 October 2009, the EC Council approved a proposal of the EC Commission regarding an extension of the period of intervention procurement. The period for buying butter and skimmed milk powder into public intervention storage is normally open only between 1 March and 31 August of each year and it is limited to 30,000 tonnes of butter and 109,000 tonnes of skimmed milk powder. The extension of the 'intervention buying' decided by the EC means that the period of intervention will be prolonged until the end of February 2010 and the purchases of the butter and skimmed milk powder are not limited to the above quotas. Purchases beyond the normal quotas will be carried-out through a tendering procedure.

Earlier in the year, another measure was taken to support the EC dairy industry. On 22 January 2009, export subsidies were established for butter, skimmed milk powder, cheese and dairy products. They are used to fill the gap between the domestic 'floor' prices and international prices and are, according to the EC, in conformity with its reduction commitments under the WTO Agreement on Agriculture (see Trade Perspectives, Issue No. 3 of 13 February 2009). There is a clear trend in supporting the restructuring of the EC dairy industry. However, the EC has subjected its domestic support measures and export subsidies to reduction commitments under the WTO Agreement on Agriculture. Countries like Argentina, Australia, Brazil, Canada, New-Zealand and Pakistan have already voiced their disappointment in relation to the re-introduction of the EC export subsidies in the WTO Committee that focuses on monitoring agricultural commitments. If these measures appear to be in violation of the specific EC commitments, they may be challenged before the WTO Dispute Settlement Body.

EC to decide upon on the possible extension of AD duties on Chinese and Vietnamese shoes

The EC Council has to decide soon whether to extend the anti-dumping duties imposed on Chinese and Vietnamese leather footwear. The extension will be decided following the conclusion of the expiry review currently being conducted by the EC Commission.

Anti-dumping proceedings concerning imports into the EC of leather footwear from China and Vietnam began in 2005. On 7 July 2005, the EC Commission had launched an anti-dumping investigation following a complaint by the Community footwear industry. On 7 April 2006, provisional anti-dumping duties were imposed by the EC Commission on imports of certain

footwear with uppers of leather originating in China and Vietnam, other than certain sports footwear, slippers and other indoor footwear and footwear with a protective toecap. On 5 October 2006, Council Regulation (EC) No. 1472/2006 confirmed the imposition of definitive anti-dumping duties on imports of certain footwear with uppers of leather originating in China and Vietnam. Special technology athletic footwear (hereinafter, STAF) of not less than 7.5 EUR is excluded of the application of the duties as such type of footwear has different basic physical and technological characteristics, is sold through different channels and has a different end use and consumer perception. Chinese and Vietnamese exporters also requested to exclude children's footwear, but such request was not granted because, even though children's footwear has different style, design, sales channels and customer service, such evidence doesn't suffice to draw a clear dividing line between children's footwear and the product concerned. It rather shows that there is a big overlap between the two products and that the children's footwear just forms a sub-category of the product concerned. Other exclusion requests regarding hiking, climbing and other outdoor shoes, footwear with mechano-therapeutic applications, Ethylene-Vinyl Acetate (EVA) beach sandals, pigskin leather shoes, patented technology footwear, and non-STAF sports footwear were denied.

Through Council Regulation (EC) No. 1472/2006, the EC imposed a 16.5% duty rate to Chinese exporters (except for the company Golden Step, which is subject to anti-dumping duties at a rate of 9.7%) and a 10% rate to Vietnamese exporters. The definitive anti-dumping duties were initially imposed for 2 years. On 7 October 2008, after an opinion given by the Anti-Dumping Committee, the EC Commission launched an expiry review. Under the EC Anti-dumping Regulation (*i.e.*, Council Regulation (EC) No. 394/96 of 22 December 1995 on protection against dumped imports from countries not member of the EC), such review can be requested no later than three months before the expiry of definitive anti-dumping duties. The request for an expiry review should contain sufficient evidence that the expiry of the measures would likely result in a continuation or recurrence of dumping and injury. An expiry review, pending which anti-dumping measures remain in force, can lead to the termination of the anti-dumping duties, or to an extension of said measures. The EC Commission may decide upon such termination or extension in November 2009.

The imposition of anti-dumping duties has affected not only the exporting industries of such products in China and Vietnam, be them European or non-European, but also the distributors of such products on the EC market. The opinions of the EC Member States about whether to continue with the imposition of such duties are, therefore, strongly divided. Those who oppose the levying of anti-dumping duties allege that imports simply shifted to other Countries that offer the same products at more or less the same price level as Chinese and Vietnamese producers and that the European shoe manufacturing industry is thriving well.

Press reports appeared to indicate that, should the EC decide to approve the extension of these measures, it would likely be for 15 months only, taking effect in January 2010. The EC could decide upon such an extension if it appears that the EC footwear industry still suffers from dumped imports. Such extension can only be authorised for a maximum of 5 years. If this were to happen, the Chinese and Vietnamese footwear industries could urge their respective Governments to challenge the continuation of the EC measures within the WTO framework. They could claim that the EC violates its obligations under Article VI of the GATT concerning anti-dumping and countervailing duties and the WTO Agreement on Anti-Dumping, which establish that anti-dumping measures can only be applied when dumping, injury and a causal link are found.

Are information messages for food additives under EC law *de facto* trade barriers?

On 16 December 2008, the regulations of the *Package on food additives, food enzymes and flavourings and food ingredients with flavouring properties* and an additional fourth regulation establishing a common authorisation procedure for additives, enzymes and flavourings were adopted. Regulation (EC) No. 1333/2008 on food additives will apply as of 20 January 2010

(except for some transitional provisions). The regulation is intended to strengthen the principle of food safety and consumer information.

Article 24 of Regulation (EC) No. 1333/2008 (concerning labelling requirements for foods containing certain food colours) provides that the labelling of food containing the food colours listed in Annex V to such Regulation must include the additional information set out in that Annex. Annex V provides that foods containing one or more of the following food colours: Sunset yellow (E 110), Quinoline yellow (E 104), Carmoisine (E 122), Allura red (E 129), Tartrazine (E 102), Ponceau 4R (E 124), with the exception of foods where the above colours have been used for the purposes of health or other marking on meat products or for stamping or decorative colouring on eggshells, must include the following information: '*name or E number of the colour(s): may have an adverse effect on activity and attention in children'*.

This provision was not included in the original Commission proposal of 28 July 2006 or in the amended Commission proposal of 24 October 2007 and was included in the Regulation at the last minute during the co-decision procedure between the EC Parliament and the Council after the publication of a Scientific Opinion of the European Food Safety Authority's (hereinafter, EFSA) Panel on Food Additives, Flavourings, Processing Aids and Food Contact Materials (hereinafter, AFC) of 7 October 2008. Such scientific opinion contained an assessment of the results of a study on the effect of some colours and the preservative sodium benzoate on children's behaviour. In the area of food additives, EFSA has three main activities: 1) carrying-out safety evaluations of new food additives before they can be authorised for use in the EC; 2) carrying-out a systematic re-evaluation of all authorised food additives in the EC; and 3) responding to *ad-hoc* requests from the EC Commission to review certain food additives in the light of significant new scientific information and/or changing conditions (as in this case).

The assessed study, published in 2007 by researchers at Southampton University in the United Kingdom (McCann *et al.*), suggested a link between these mixtures of additives and hyperactivity in children. EFSA's AFC Panel, with the help of experts in behaviour, child psychiatry, allergy and statistics, concluded that this study provided limited evidence that the mixtures of additives tested had only a small effect on the activity and attention of some children. Nevertheless, an information message, which seems to be in fact, a warning message, was included in the EC Regulation. It should be noted that a number of additives are already accompanied by warning messages, such as in the case of the labelling of a table-top sweetener containing polyols ('*excessive consumption may induce laxative effects*') and/or aspartame and/or aspartame-acesulfame ('*contains a source of phenylalanine*'). It is not known whether this requirement has had a negative effect on their sales. However, in the case of the so-called Southampton colours, the warning relates to a danger to children. This fact has already been considered as a *de facto* ban for these additives since it would have a strong effect on consumers' perception and, ultimately, on sales.

Article 24 of Regulation (EC) No. 1333/2008 on food additives shall apply from 20 July 2010. Therefore, companies that continue using the respective additives have a transitional period to comply with the information labelling requirement '*may have an adverse effect on activity and attention in children'*. Now it appears that the food industry is moving towards the use of other additives in order to replace the 'banned' colours. The lesson learned from this case is that companies and trade associations should closely monitor the complicated EC legislative procedures, particularly the co-decision procedure between the EC Parliament and the EC Council, which will be applied even more after the entry into force of the Lisbon Treaty.

Canada requests the establishment of a Panel in the US – COOL case

On 9 October 2009, the request for the establishment of a WTO panel by Canada was circulated with respect to the US – Certain Country of Origin Labelling (COOL) Requirements dispute. Canada first requested consultations on 1 December 2008, which were held on 16 December 2008. However, no satisfactory resolution of the matter was reached. On 5 May 2009, additional

consultations were held (see Trade Perspectives, Issue No. 10 of 22 May 2009), but Parties failed to settle the dispute.

Canada alleges that the US provisions on the mandatory country of origin labelling inserted, inter alia, in the Agricultural Marketing Act of 1946, as amended by the Farm Bill of 2008 and as implemented through the Interim Final Rule of 28 July 2008, violate certain WTO obligations under the GATT, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, 'the SPS Agreement'), the WTO Agreement on Technical Barriers to Trade (hereinafter, 'the TBT Agreement') and the WTO Agreement on Rules of Origin. In particular, under the US provisions, consumers must be informed, at the retail level, of the country of origin with respect of a number of commodities, including beef and pork. For commodities derived from animals to have the exclusive US origin label, those animals must have been born, raised and slaughtered in the US.

Under Article IX of the GATT, marks of origin are permitted. However, such marks of origin may, inter alia, not lead to an unreasonable increase in costs. Canada claims that the increased costs for the downstream packing and retailing industry, due to the separation and labelling of the meat from Canadian livestock or animals that are born and raised in Canada, but slaughtered in the US, adversely affect the exports from Canada to the US. This, therefore, leads to treatment less favourable to the Canadian exporters, in violation of Article III:4 of the GATT. Furthermore, Canada alleges that the COOL requirements are in violation of the WTO obligations of the US under certain provisions of Article 2 of the TBT Agreement. These provisions establish that technical regulations must not result in treatment less favourable than that accorded to like products of national origin and that they should not be prepared, adopted or applied with a view to or having the effect of creating unnecessary obstacles to international trade, which, according to Canada, occurs in this case.

For US domestic producers, COOL requirements generate certain advantages as consumers often perceive domestic food to be safer and of higher quality. Canadian producers claim that consumers often also react negatively to products that are not identified as being from their domestic producers and, furthermore, they claim that the increased costs make packers and retailers rather want to avoid additional supply chain costs, thereby resorting to domestic products only. Mexico has started a parallel dispute with the US concerning the same measures. Mexico's request for the establishment of a WTO panel to decide on the US COOL requirements was circulated on 13 October 2009. Canadian, Mexican and other foreign meat producers should follow this case closely as it could create an important 'precedent' in this matter. There is a thin line between the kind of information which is necessary for consumers to be well-informed and not deceived and the type of information that constitutes an unnecessary burden upon producers, packers and retailers.

Recently Adopted EC Legislation:

- *Commission Regulation (EC) No. 1026/2009 of 29 October 2009 correcting Regulation (EC) No. 567/2009 entering a name in the register of traditional specialities guaranteed (Pierekaczewnik (TSG))*

- *Commission Regulation (EC) No. 1028/2009 of 29 October 2009 entering a name in the register of protected designations of origin and protected geographical indications (Amarene Brusche di Modena (PGI))*

- *Commission Regulation (EC) No. 1029/2009 of 29 October 2009 entering a name in the register of protected designations of origin and protected geographical indications (Grelos de Galicia (PGI))*

- *Commission Regulation (EC) No. 1030/2009 of 29 October 2009 approving minor amendments to the specification of a name registered in the register of protected designations of origin and protected geographical indications (Pecorino Romano (PDO))*

- *Commission Regulation (EC) No. 1031/2009 of 29 October 2009 amending Regulation (EC) No. 1580/2007 as regards the trigger levels for additional duties on cucumbers, artichokes, clementines, mandarins and oranges*

- *Commission Regulation (EC) No. 1013/2009 of 26 October 2009 amending and correcting Regulation (EC) No. 2535/2001 laying down detailed rules for applying Council Regulation (EC) No. 1255/1999 as regards the import arrangements for milk and milk products and opening tariff quotas*

- *Commission Regulation (EC) No. 991/2009 of 22 October 2009 entering a name in the register of protected designations of origin and protected geographical indications (Schwäbische Maultaschen or Schwäbische Suppenmaultaschen (PGI))*

- *Commission Regulation (EC) No. 992/2009 of 22 October 2009 amending Annex IV to Council Regulation (EC) No. 73/2009 establishing common rules for direct support schemes for farmers under the common agricultural policy*

- *Commission Regulation (EC) No. 985/2009 of 21 October 2009 entering a name in the register of protected designations of origin and protected geographical indications (Hajdúsági torma (PDO))*

- *Commission Regulation (EC) No. 986/2009 of 21 October 2009 entering a name in the register of protected designations of origin and protected geographical indications (Traditional Grimsby Smoked Fish (PGI))*

- *Council Regulation (EC) No. 989/2009 of 19 October 2009 amending Regulation (EC) No. 661/2008, imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia*