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The EU imposes anti-dumping measures on bioethanol imported from the US

On 18 February 2013, the EU Commission adopted '*Council Implementing Regulation (EU) No. 157/2013 imposing a definitive anti-dumping duty on imports of bioethanol originating in the United States of America*', by virtue of which it terminated the anti-dumping investigation on bioethanol from the US, concluded that it was indeed subjected to dumping, and therefore adopted anti-dumping duties for a period of, in principle, five years.

The notice of termination puts an end to the anti-dumping proceedings launched on 25 November 2011 by the EU Commission, following a complaint lodged by the European Producers Union of Renewable Ethanol Association (hereinafter, ePURE). In its complaint, ePURE alleged that imports of bioethanol originating from the US were benefiting from illegal subsidies or being dumped, and presented *prima facie* evidence that such circumstance was causing '*substantial adverse effects on the overall performance and financial situation*' of the EU bioethanol industry (see Trade Perspectives, Issue No. 19 of 19 October 2012). Following such complaint, the EU Commission initiated two separate proceedings (*i.e.*, AD580 and AS581), aimed at establishing whether US exporters of bioethanol to the EU were benefiting from illegal subsidies and/or employing dumping practices. For the purpose of such proceedings, the product under investigation was referred to as '*fuel ethanol*', *i.e.*, '*ethyl alcohol produced from agricultural products, denatured or undenatured, excluding products with a water content of more than 0.3% (m/m) measured according to the standard EN 15376, but including ethyl alcohol produced from agricultural products contained in blends with gasoline with an ethyl alcohol content of more than 10% (v/v) intended for fuel uses*'.

The anti-dumping investigation was launched pursuant to '*Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community*', (the EU Basic Anti-dumping Regulation), and aimed at establishing whether: 1) US bioethanol exporters engaged in dumping; 2) the EU industry suffered material injury; 3) there was a causal link between dumping and such injury; and 4) the imposition of anti-dumping duties would not be against EU interests. Although reports appeared to indicate that the proceedings would terminate without the imposition of anti-dumping duties (see Trade Perspectives, Issue No. 19 of 19 October 2012), the notice of termination has proven differently. Indeed, the EU Commission found that US bioethanol exporters engaged in dumping, and therefore established that an anti-dumping duty, in the amount of EUR 62.3 per tonne net, be applied to US imports of bioethanol, except where those are employed for uses other than fuelling, in which case they remain exempted. The anti-dumping measures will remain in place for a period of five years, unless an expiry review determines that dumping or injury will continue after their expiration, and therefore establishes that measures must remain operative for another five years.

Simultaneously to the anti-dumping proceedings, the EU Commission launched an anti-subsidy investigation with a view to establishing whether: 1) bioethanol imports from the US

benefited from illegal subsidies; 2) the EU industry suffered injury; 3) there was a causal link between such injury and the subsidies granted; and 4) the imposition of countervailing duties would not be against the EU's interests. In this context, the EU Commission examined a number of US Federal and State schemes, including, *inter alia*, the '*Volumetric Ethanol Excise Tax Credit*' (hereinafter, VEETC), which envisaged a tax credit of USD 45 cents per gallon of pure ethanol blended with gasoline (for further background on the VEETC, see Trade Perspectives, Issue No. 23 of 20 December 2010). In its notice of termination of the anti-subsidy proceedings of 20 December 2012, the EU Commission found that countervailable subsidies were exclusively being granted under the VEETC, but that since the scheme had expired at the end of 2011, and had not been reintroduced, no imposition of anti-subsidy measures was due. Regarding the other investigated schemes, the EU Commission concluded that they were also not susceptible of countervailing duties, inasmuch as the amount of granted subsidies was below the *de minimis* threshold, set at 2% *ad valorem* by '*Council Regulation (EC) No. 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community*' (the EU Basic Anti-subsidy Regulation). In addition, the EU Commission established that US imports of bioethanol no longer be registered at customs, as was required by the EU Commission's *interim* conclusions to the proceedings of 23 August 2012.

The recently imposed anti-dumping duty on bioethanol adds to the web of trade defence measures that the EU has put in place with respect to international trade in biofuels. In particular, the EU maintains anti-dumping and countervailing duties on biodiesel imports from the US, and is presently conducting anti-dumping investigations on biodiesel from Argentina and Indonesia. Against this background, future FTA negotiations between the EU and the US will surely be affected by the application of these trade defence instruments on trade in biofuels. Companies operating in the sector of biofuels are advised to stay abreast of these upcoming negotiating developments and work with their respective Governments in order to have their commercially interests duly represented.

The horsemeat scandal in the EU: Calls for country of origin labelling of meat ingredients in ready meals, DNA testing and severe sanctions for intentional violations of food chain rules

Following official controls being carried out since December 2012 in a number of EU Member States, it was detected that certain pre-packaged food products contained horsemeat, which was not declared in the list of ingredients appearing directly on the package or on a label attached thereto. Instead, the name of some of these products and/or the accompanying list of ingredients misleadingly referred only to the presence of beef. In principle, there is no food safety issue with horsemeat, provided that the horse has not been treated with certain veterinary drugs. It appears that, as horses are typically not farmed, the history of treatments cannot always be fully traced. Further to calls for more testing of processed meat for horse DNA and higher sanctions for this type of fraud, several EU Member States are pushing for country of origin labelling (hereinafter, COOL) to help combat scandals like the one concerning horse meat. The EU Health and Consumer Commissioner, Mr. Tonio Borg, reportedly expressed the view that, although this criminal fraud is about the animal species in the meat product itself and COOL would not have prevented it, the EU Commission had an '*open mind*' when it comes to COOL on prepared foods.

Under current EU food labelling rules, COOL is mandatory where a failure to provide such information could mislead consumers and also for a limited range of commodities (such as fruits and vegetables, beef, fish, olive oil and honey). Under *Regulation (EU) No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers* (hereinafter, FIR), which repeals, *inter alia, Directive 2000/13/EC on food labelling* (see Trade Perspectives, Issue No. 14 of 15 July 2011), the scope of

mandatory COOL has been extended. As of 14 December 2014, in addition to beef, origin labelling will become mandatory on fresh, frozen and chilled meat of pig, poultry, sheep and goat, although the exact content of the information to appear on the label (*i.e.*, place of the animal's birth and/or rearing and/or slaughter) is yet to be decided.

Under Article 26(5) of FIR, by 13 December 2014, the EU Commission must submit reports to the EU Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for the following foods: (a) types of meat other than beef, pig, poultry, sheep and goat; (b) milk; (c) milk used as an ingredient in dairy products; (d) unprocessed foods; (e) single ingredient products; and (f) ingredients that represent more than 50% of a food. This report could address, *inter alia*, mandatory COOL for other types of meat like horsemeat. By 13 December 2013, Article 26 (6) of FIR sets out that the EU Commission must submit a report to the EU Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for meat used as an ingredient. A possible legal basis for COOL for meat used as an ingredient was, therefore, already established in FIR, long before the horsemeat crisis broke out. Both EU Commission reports on the possible extension of the scope of COOL must take into account the need for the consumer to be informed, the feasibility of providing the mandatory indication of the country of origin or place of provenance and an analysis of the costs and benefits of the introduction of such measures, including the legal impact on the internal market and the impact on international trade. The EU Commission reportedly indicated that the report and impact assessment on meat used as an ingredient, which is due in December 2013, was already on its way, and could be published at the end of the Summer, so that EU Member States could review it earlier.

In establishing new legislation on COOL, the EU must also take into consideration the relevant parameters set by the WTO. On 29 June 2012, in the *US/COOL* dispute, the WTO Appellate Body issued its final report upholding, for the most part, the Panel's finding that a series of US statutory provisions pertaining to certain mandatory COOL measures, which required consumers to be informed at the retail level of the country of origin of certain covered agricultural commodities, including beef and pork, were inconsistent with the national treatment obligation established in Article 2.1 of the WTO Agreement on Technical Barriers to Trade (for more background and analysis on the *US/COOL* dispute, see TradePerspectives Issues No. 22 of 2 December 2011 and No. 14 of 13 July 2012).

Besides the possible COOL instrument, DNA testing of meat products appears to be important in the fight against fraud. The EU has launched urgent tests for horse DNA in meat products and tests to look for the presence of phenylbutazone, an anti-inflammatory treatment for horses, which is harmful to humans. Considering the fraudulent practices relating to the unlabelled presence of horsemeat in certain food products, the EU Commission considers it appropriate, for preventive purposes, to ascertain whether '*non-food producing*' horses treated with phenylbutazone have entered the food chain. The coordinated control plan is carried out for a period of one month starting from the date of adoption of the *EU Commission Recommendation 2013/99/EU of 19 February 2013 on a coordinated control plan with a view to establish the prevalence of fraudulent practices in the marketing of certain foods*. The legal basis for this recommendation is Article 53 of *Regulation (EC) No. 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules,* which empowers the EU Commission to recommend coordinated plans where considered necessary, organised on an *ad hoc* basis, in particular with a view to establishing the prevalence of hazards in feed, food or animals.

The EU Commission is reportedly also preparing for this Spring a proposal to fight food fraud and to review food legislation to reinforce the element of dissuasiveness. This proposal is said to include a call on EU Member States to agree financial penalties for intentional

violations of food chain rules at a level which offsets the financial gain sought through the violation. Even in the case of false labelling, sanctions must serve as an effective deterrent. This does not appear to happen with the current penalties for non-compliance with labelling requirements, which are set by EU Member States. In the UK, for example, under the Meat Products Regulations (MPR) and under the Food Labelling Regulations (FLR), non-compliance with food labelling requirements is considered an offence and the penalty on conviction for an offence under the MPR or FLR is a fine of not more than level 5 on the standard scale (*i.e.*, currently £5,000). An EU Commission proposal for harmonised and increased financial sanctions will have to be agreed by both the EU Parliament and the 27 EU Member States, which makes it unlikely that new sanctions be in place before 2014.

The recent case in Germany, where eggs of about 150 farms have been declared and marketed as '*organic*', although they did not comply with the strict production standards for organic products, is another case that shows how the multiple labelling schemes for food products in the EU do not appear equipped to guarantee consumer protection and may even '*invite*' to fraud. Severe sanctions for intentional violations of labelling requirements might be an option, but to be effective they would need to be accompanied by more and better controls. It remains to be seen whether the EU Commission's report and impact assessment on COOL for meat used as an ingredient, expected for this Summer, concludes that the benefits of the introduction of such measure, including the legal impact on the internal market and the commercial impact on international trade, outweighs the related costs for food business operators.

The EU Timber Regulation comes into force outlawing illegal timber and timber products from the EU market

The entry into force, on 3 March 2013, of the *Regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market* (hereinafter, the Timber Regulation), with no retroactive effects, marks the latest evolution of the Forest Law Enforcement, Governance and Trade (hereinafter, the FLEGT) Action Plan, as established in 2003. The FLEGT Action Plan set the framework for an EU strategy to combat illegal timber trade. In order to achieve such an objective, the EU adopted two schemes: the FLEGT licensing scheme, covering timber exported from countries that negotiated Voluntary Partnership Agreements (hereinafter, VPAs) with the EU; and the Timber Regulation, with which the EU outlawed the placing on its market of illegally harvested timber or timber products falling under the scope of the Regulation, as set out in its Annex. The objective of these schemes is to ensure that timber or timber products are in compliance with the rules and obligations of the country where they are being processed and exported from, and, in particular, that such products are obtained from timber which is legally harvested.

Concretely, the Timber Regulation prohibits the placement of timber and timber products on the EU market, unless accompanied by the FLEGT or CITES licenses or proven legal. The other two main elements of Timber Regulation are: (i) a *due diligence* obligation for operators placing timber or timber products for the first time on the EU market; and (ii) an obligation of traceability for traders. The qualification as an operator or a trader depends on the activity conducted in the EU. Operators are natural or legal persons placing timber or timber products on the market, while traders are those selling or buying on the internal market timber or timber products already placed on the internal market. The *due diligence* requirement foreseen in Article 6 of the Timber Regulation is an obligation bearing on operators to put in place a framework of procedures to ensure that illegally harvested timber, or products obtained therefrom, are not placed on the EU market. In particular, operators are required to: (i) collect general information on the origin of the timber products (*i.e.*, on the legality); (ii) evaluate the level of risk and conduct a risk assessment; and (iii) put in place

risk mitigation procedures to avoid that timber products from illegally harvested timber are placed on the EU market. The Timber Regulation provides for risk assessment criteria that have to be taken into consideration, which include, *inter alia*, the prevalence of illegal harvesting of specific tree species and the complexity of the supply chain of timber and timber products. Operators may put in place their own due diligence procedures or resort to so-called '*monitoring organisations*' recognised by the EU Commission.

The prohibition embedded in the Timber Regulation, and the related evidentiary requirements needed to proof the legal origin of the timber products, may have an impact on the EU's obligations under Article VIII and Article XI of the General Agreement on Tariffs and Trade (hereinafter, the GATT) and under the Agreement on Technical Barriers to Trade (hereinafter, the TBT Agreement). In particular, Article VIII.1(c) of the GATT, read together with Article VIII.4(c) and (f), provides for a requirement to minimise the incidence and impacts, on imports and exports, of licensing, documents, documentation and certification requirements imposed by WTO Members. In the context of the Timber Regulation, which arguably imposes heavy administrative burdens on operators placing timber and timber products on the EU market, it could be argued that the EU has not taken the necessary steps to minimise the incidents and impacts of its regulatory framework on import and exports of timber and timber products, particularly in light of the availability of less trade distortive alternatives. In addition, the import prohibition and the *due diligence* requirements may arguably qualify as quantitative restrictions within the meaning of Article XI of the GATT. Indeed, Article XI provides that '[*n]o prohibitions or restrictions other than duties, taxes or other charges […] shall be instituted or maintained by any contracting party*'. Inasmuch as the Timber Regulation prohibits operators to place timber or timber products on the EU market, unless they can establish the proof of legality of the timber and timber products, and sets forth cumbersome requirements for the proof of origin, the Timber Regulation maybe considered inconsistent (*de facto* if not *de jure*) with Article XI of the GATT. It must be noted that, however, where these possible inconsistencies arise under the GATT, the Timber Regulation might still qualify as an exception under the General Exceptions set forth in Article XX of the GATT. Lastly, inasmuch as the Timber Regulation qualifies as a technical regulation within the meaning of Annex 1, paragraph 1 of the TBT Agreement, it may arguably have an impact on the EU's obligation under Article 2.2 of the TBT Agreement, if it is shown that other less trade-restrictive alternatives could have been put in place to fight illegal timber trade.

With the entry into force of the Timber Regulation, the EU requires that timber products that are not accompanied by the FLEGT or CITES licenses be subject to the *due diligence* mechanisms to be implemented by the operators. Basically, operators wishing to place timber products on the EU market are left with two options: either their country has a VPA in place with the EU, so they may benefit from the FLEGT licensing scheme; or they have to comply with the framework established in the Timber Regulation. Operators placing timber or timber products in the EU have now increased administrative burdens to establish that the products put for the first time on the market have been legally processed and exported. The consequences of non-compliance with the *due diligence* requirement may include seizure of timber and timber products concerned, immediate suspension of authorisation to trade and fines proportional to the damage resulting from the infringement. While the aim of the EU Regulation is noble and based on the legitimate objective of environmental protection, it remains to be seen whether the impact of this regulatory framework and the way in which it is applied will survive a possible WTO scrutiny.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Decision of 1 March 2013 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*

- *Commission Regulation (EU) No. 195/2013 of 7 March 2013 amending Directive 2007/46/EC of the European Parliament and of the Council and Commission Regulation (EC) No. 692/2008 as concerns innovative technologies for reducing CO2emissions from light passenger and commercial vehicles*

- *Regulation (EU) No. 167/2013 of the European Parliament and of the Council of 5 February 2013 on the approval and market surveillance of agricultural and forestry vehicles*

- *Regulation (EU) No. 168/2013 of the European Parliament and of the Council of 15 January 2013 on the approval and market surveillance of two- or three-wheel vehicles and quadricycles*

Trade Remedies

- *Commission Regulation (EU) No. 182/2013 of 1 March 2013 making imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China subject to registration*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) No. 196/2013 of 7 March 2013 amending Annex II to Regulation (EU) No. 206/2010 as regards the new entry for Japan in the list of third countries or parts thereof from which imports into the European Union of certain fresh meat are authorised*

- *Commission Implementing Decision of 21 February 2013 amending Decision 2007/777/EC as regards the entry for Brazil in the list of third countries and parts thereof from where imports into the Union of biltong/jerky and pasteurised meat products are authorised (notified under document C(2013) 899)*

Trade-Related Intellectual Property Rights

- *Commission Implementing Regulation (EU) No. 172/2013 of 26 February 2013 on the removing of certain existing wine names from the register provided for in Council Regulation (EC) No. 1234/2007*

- *Notice concerning the entry into force of the Agreement between the European Union and the Republic of Moldova on the protection of geographical indications of agricultural products and foodstuffs*

Other

- *Definitive adoption of the European Union's general budget for the financial year 2013*

- *Commission Implementing Regulation (EU) No. 198/2013 of 7 March 2013 on the selection of a symbol for the purpose of identifying medicinal products for human use that are subject to additional monitoring*

- *Commission Decision of 1 March 2013 establishing the guidelines for Member States on calculating renewable energy from heat pumps from different heat pump technologies pursuant to Article 5 of Directive 2009/28/EC of the European Parliament and of the Council (notified under document C(2013) 1082)*

- *Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999*

- *Regional Convention on pan-Euro-Mediterranean preferential rules of origin*

- *Council Decision of 13 November 2012 on the signing and conclusion of the Agreement between the Government of the United States of America and the European Union on the coordination of energy-efficiency labelling programmes for office equipment*

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