FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 19 of 16 October 2009

Are the new EC rules on toy safety too burdensome for manufacturers and traders?

On 20 July 2009, the new toy safety Directive No. 2009/48/EC entered into force. It aims at giving consumers the assurance that toys sold in the EC fulfil the highest safety requirements, especially those relating to the use of chemical substances. For a period of two years after the entry into force of this directive, toys that comply with the previous Directive No. 88/378/EEC on the safety of toys, which harmonised the safety provisions on toys between EC Member States, may still be placed on the market. Therefore, both the old and new toy safety directives may be applied for toys placed on the market before 20 July 2011.

The directives establish the essential safety requirements that toys placed on the market in the Community have to fulfil. In addition to the 6 categories of safety requirements established under the old Directive (*i.e.*, physical, mechanical, electrical, flammability, hygiene and radioactivity hazards that toys may present), under the new directive toys must also comply with EC chemicals legislation, including REACH rules on the Registration, Evaluation, Authorisation and Restriction of Chemical substances. Toys and their components shall not contain carcinogenic, mutagenic or toxic-for-reproduction (CMR) substances. Exemptions are granted depending on their concentration or if they are contained in components or parts of toys that are not accessible to children in any form, including through inhalation. For the chemical safety requirements, the transitional period has been set until 20 July 2013 to permit the development of harmonised standards which are necessary for compliance with those requirements (this will also give manufacturers time to adapt).

Apart from the chemical safety requirements, the major change in the new rules is the requirement for an EC declaration of conformity which has to be drawn-up by the manufacturer. The assessment should include an analysis of the chemical, physical, mechanical, electrical, flammability, hygiene and radioactivity hazards that the toy may present and an assessment of the potential exposure to them. The declaration shall be drawn-up for each model of toy. Therefore, manufacturers are obliged to identify any hazard that a toy may present. Manufacturers can choose between two systems for the conformity assessment: First, *self-verification*, in which the manufacturer applies the harmonised standards and describes the means whereby the conformity of production is ensured. The manufacturer draws-up both the technical documentation and the EC declaration of conformity (according to Directive No. 2009/48/EC). Then, he affixes the CE marking, his name and address and an identification element (to ensure traceability) before placing the toy on the market. The second option is *third party certification*, in which the manufacturer submits the model of the toy, as well as the technical documentation, to an agreed body which issues an EC-type examination certificate.

The new EC rules on toy safety have already been labelled by some as technical barriers to trade. In addition to the complex and costly issue of the application of new chemical safety standards, the applicable conformity assessment procedures have been questioned by some as too burdensome.

Under Article 5.1.2 of the WTO TBT Agreement (Procedures for Assessment of Conformity by Central Government Bodies), WTO Members must ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, *inter alia*, that conformity assessment procedures must not be stricter (or be applied more strictly) than necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks that non-conformity would create. The new directive also provides that the precautionary principle should be applied when taking measures if the available scientific evidence is insufficient to allow for an accurate risk assessment. The absence of an express requirement under the TBT Agreement for the timely gathering of scientific evidence (as provided for the use of the precautionary principle under Article 5.7 of the SPS Agreement, which refer to a 'reasonable period of time'), may result in the longer application of trade restrictive measures taken and justified on the basis of the precautionary principle.

It remains to be seen whether any of the toy-exporting Countries, which may consider the new EC requirements on the safety of toys as actual or potential trade barriers, will challenge the EC measure at the WTO. Operators in this sector should closely monitor the situation and interact with their Governments in order to safeguard their commercial interests and explore specific trade facilitation initiative such as mutual recognition of conformity assessment procedures or of certifying bodies.

The EC reaches a compromise with Uruguay in the whisky case, while it is still looking for a solution to its 'alcohol problem' with the Philippines

On 6 October 2009, the European Commission's Decision terminating the examination procedure concerning the measures imposed by Uruguay affecting the sale and importation of whisky in Uruguay was published. In fact, on 2 September 2004, the Scotch Whisky Association had lodged a complaint alleging the existence of four barriers to trade vis-à-vis Uruguay: the ageing requirement for whisky excluding the European whisky from the lowest taxation category, the pre-payment of import taxes at a rate of 80%, the requirement to affix tax stamps, and the overall lack of transparency of the Uruguayan tax regulation.

According to Article III:1 of the GATT, internal taxes and other internal charges, laws, regulations and requirements affecting internal sales must be administered on a non-discriminatory basis for both domestic goods and imported products. Under the EC Trade Barriers Regulation, a Community Industry or a Community Enterprise may lodge a complaint with the European Commission when obstacles to trade hinder the sales of their products on third markets. It is then for the European Commission to decide whether or not to open an investigation. Such investigation may lead to consultations with the other Country involved within or outside of the framework of the WTO. *In casu*, during the investigations, Uruguay showed its willingness to come to a mutually satisfactory solution. Uruguay proposed to withdraw the exclusion of whisky matured over three or more years from the lowest category of taxation by 1 July 2005 and effectively did so. Regarding the requirement to affix the taxation stamps, Uruguay also amended its regulations within the fixed time schedule. However, with respect to the requested reform of its tax system and the pre-payment of the import taxes, Uruguay delayed its actions until the end of 2007. According to the EC, such outcome represents a satisfactory compromise and the Commission closed the related examination procedure on 9 October 2009.

At the same time, the EC has been conducting consultations with the Philippines within the framework of the WTO dispute settlement system in relation to the Filipino excise tax regime on distilled spirits (see Trade Perspectives, Issue No. 16 of 4 September 2009). The EC alleges that the taxes on imported spirits are 10 to 50 times higher than the taxes for the same domestic products. This is a discriminatory measure and violates Article III.2 of the GATT. It appears that no compromise or mutually acceptable solution has been reached during last week's meeting. If consultations don't reach a satisfactory result within 60 days after the receipt of the request for consultations, the EC can request the establishment of a WTO Panel.

Contrary to the case of Uruguay, the Philippines' case did not first pass through the procedures of the EC Trade Barriers Regulation. The European industry had voiced its concerns regarding the excise tax regime for years and was able to pressure the European Commission to take this case directly to the WTO. This shows that there is a variety of ways to address barriers to trade that affect European exporters, both based on well-rehearsed disciplines and procedures or on tailor-made initiatives defined in cooperation with the European Commission and EC Member States. It is critical that EC producers, traders and economic operators, which feel discriminated upon in third markets or that are facing trade barriers, assess the legal, commercial and political implications of their situations and closely coordinate with their Member States and the European Commission in defining the strategies that are best suited to reach the intended objectives.

The US requests the establishment of a panel on the EC poultry ban

On 8 October 2009, the US requested the establishment of a WTO panel to investigate certain measures affecting poultry meat and poultry meat products from the US to the EC. This follows the consultations with the EC that the US had requested on 16 January 2009 and which were held on 11 February 2009 (see Trade Perspectives, Issue No. 2 of 30 January 2009). No agreement was then reached. The WTO Dispute Settlement Body will consider the request to establish a panel during its next meeting on 23 October 2009.

The key measure at stake in this dispute is EC Regulation No. 853/2004 concerning the specific hygiene rules for food of animal origin. This regulation establishes that slaughterhouses can only use water and other approved substances to rinse meat products (of any kind) in order to remove surface contamination. This rule applies whether the meat that is sold is produced in the EC or abroad. The dispute started in 1997 when pathogen reduction treatments (hereinafter, PRTs) were prohibited by the EC out of hygiene, public health and consumer protection concerns. PRTs are designed to reduce the amount of microbes on the meat. This greatly affected the exports from the US to the EC as most slaughterhouses in the US use PRTs and, therefore, were removed from the list of slaughterhouses from which imports are allowed.

The US alleges, *inter alia*, that the EC violates its obligations under the WTO SPS Agreement. The US claims, in particular, that the EC breaches Article 2.2 of said agreement. This article states that sanitary or phytosanitary measures can only be applied to the extent that they serve to protect human, animal or plant life, of which the justification has to be given through sufficient scientific evidence. Sufficient in this context means, according to *Japan – Agricultural Products II*, that an adequate relation must exist between the SPS measure and the scientific evidence. The US asked the EC to approve four PRTs (*i.e.*, chlorine dioxide, acidified sodium chlorite, trisodium phosphate and peroxyacids) in 2002. To date, the EC has not yet done so, even though, according to the US,

various EC agencies have issued scientific reports in which the safety of those PRTs is confirmed. Following *EC – Hormones*, and consistently with Article 5.1 of the SPS Agreement, there should be a rational relationship between the measure taken and the risk assessment. The US alleges that, because evidence suggests that the use of the four PRTs doesn't pose any risk to human health, there is no such rational relation between the risk assessment undertaken by the EC and the measure taken.

The US is the largest poultry meat producer in the world. US producers and EC importers of US poultry have a clear interest in closely monitoring this case, as it could bring an end to a long dispute and re-open a large and lucrative export market. In 2008 alone, the EC imported 890,000 tons of poultry meat from third countries, the biggest share coming from Thailand and Brazil (thanks, in large measure to TRQ preferential allocations). Since poultry imports from the US have been very modest following the EC prohibition of all PRTs, this case could bring important changes to the trade patterns and volumes.

The EC and South Korea conclude negotiations for a comprehensive Free Trade Agreement

After eight rounds of formal negotiations, on 15 October 2009, the EC and South Korea initialled an FTA. Negotiations were officially launched on 6 May 2007, after the European Commission obtained the mandate from the EC Council to negotiate one of the most ambitious FTA deals concluded by the EC.

The EC-Korea FTA is set to eliminate or phase-out tariffs on 96% of EC products and 99% of South Korean products within three years from its entry into force. Import duties will be immediately eliminated on 76.7% of EC products and 69.4 % of Korean goods. The deal also includes provisions on non-tariff barriers in a number of sectors of interest to the EC, such as automotive, pharmaceutical and consumer electronics. It appears that under the agreement South Korea will be required to consider as equivalent a number of EC standards and recognise EC certificates. In addition, the FTA also provides rules grating a high level of protection for EC geographical indications, including Champagne, Prosciutto di Parma, Feta Cheese, Rioja or Tokaji wine.

One of the most controversial issues of the negotiations between the EC and Korea concerned the possibility for South Korea to continue applying duty draw-back schemes (see Trade Perspectives, Issue No. 6 of 27 March 2009). The deal allows the two trading blocks to maintain duty draw-back schemes. However, this possibility is limited by a specific mechanism that caps the amount of refunds to a level of 5% when outsourcing from countries with which South Korea applies MFN duty levels (e.g., China) 'significantly' increases. The mechanism is based on continued exchange of information and consultations between the parties on import and export flows concerning certain sensitive products, and the application of the cap is triggered upon request by one of the parties.

At the EC level, the FTA needs to be approved by the EC Council. Discussions at the EC Council are likely to take place during the first months of 2010. The agreement is facing strong opposition from certain EC industries, such as the automotive industry, that are likely to be mostly affected by the expanded market access granted to South Korean products.

Recently Adopted EC Legislation:

- *Commission Regulation (EC) No. 964/2009 of 15 October 2009 entering a name in the register of protected designations of origin and protected geographical indications (Raviole du Dauphiné (PGI))*

- *Commission Regulation (EC) No. 965/2009 of 15 October 2009 entering a name in the register of protected designations of origin and protected geographical indications (Faba de Lourenzá (PGI))*

- *Commission Regulation (EC) No. 960/2009 of 14 October 2009 amending Regulation (EC) No. 1905/2006 of the European Parliament and of the Council establishing a financing instrument for development cooperation*

- *Commission Regulation (EC) No. 961/2009 of 14 October 2009 entering a name in the register of protected designations of origin and protected geographical indications (Březnický ležák (PGI))*

- *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*

- *Agreement between the European Community and the Government of the Republic of Azerbaijan on certain aspects of air services (09.10.2009)*

- *Commission Regulation (EC) No. 933/2009 of 6 October 2009 laying down detailed rules for the application of Council Regulation (EC) No. 779/98 as regards opening and providing for the administration of certain quotas for imports into the Community of poultrymeat products originating in Turkey*

- *Commission Decision of 5 October 2009 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of certain aluminium foil originating, inter alia, in Brazil*

- *Commission Decision of 5 October 2009 terminating the examination procedure concerning the measures imposed by the Eastern Republic of Uruguay affecting the importation and sale of whisky in Uruguay*

- *Council Regulation (EC) No. 925/2009 of 24 September 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium foil originating in Armenia, Brazil and the People's Republic of China*

- *Council Regulation (EC) No. 926/2009 of 24 September 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China*

- *Council Decision of 24 September 2009 extending the period of application of the measures in Decision 2007/641/EC concluding consultations with the Republic of the Fiji Islands under Article 96 of the ACP-EC Partnership Agreement and Article 37 of the Development Cooperation Instrument*

- *Decision No. 1/2009 of the EU-South Africa Cooperation Council of 16 September 2009 on the amendment of Annex IV and Annex VI to the Agreement on Trade, Development and Cooperation between the European Community and its Member States, on the one part, and the Republic of South Africa, on the other part, regarding certain agricultural products*

- *Council Decision of 13 July 2009 on the signature and provisional application of the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part*

FratiniVergano specializes in European and international law, notably WTO and EC trade law, EC agricultural and food law, EC competition and internal market law, EC regulation and public affairs. For more information, please contact us at:

FRATINIVERGANO
EUROPEAN LAWYERS

Rue de Haerne 42, B-1040 Brussels, Belgium Tel.: +32 2 648 21 61 - Fax: +32 2 646 02 70
www.FratiniVergano.eu