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The EU challenges Russia's 'recycling fee' on motor vehicles before the WTO

On 9 July 2013, the EU submitted a request for WTO consultations with Russia concerning the imposition of a fee on motor vehicles (hereinafter, the '*recycling fee*'). This constitutes the first request for consultations filed by a WTO Member against Russia, which acceded to the WTO in August 2012.

The controversial measure is embodied in Russia's '*Federal Law No. 89-FZ on production and consumption wastes, as amended by Federal Law No. 128-FZ on the introduction of amendments to Federal Law No. 89-FZ on production and consumption wastes and Article 51 of the Budget Code of the Russian Federation*' and '*Resolution of the Government of the Russian Federation No. 870 of 30 August 2012 on the recycling fee for wheeled transport vehicles*'. Through these regulations, Russia appears to require that motor vehicles satisfy the payment of a '*recycling fee*', ranging from EUR 420 to EUR 147,700, reportedly on environmental grounds. The Russian regulations establish that domestic Russian vehicles may be, under certain conditions, exempted from the payment of such '*recycling fee*'. Likewise, an exemption is reportedly available for vehicles originating from the other members of the Eurasian Economic Community's customs union (*i.e.*, Belarus and Kazakhstan). In addition, the EU argues that the structure and progressive nature of the '*recycling fee*', the amount of which is determined on the basis of criteria including the vehicles' year of manufacture, weight and other physical characteristics, affords protection to domestically produced vehicles, at the same time as it negatively impacts on imported vehicles. According to the EU, the '*recycling fee*' applies, in practice, mostly to imported motor vehicles from outside the customs union and is contrary to Russia's WTO obligations inasmuch as it discriminates between imported and domestic goods, as well as between imported goods. In its request for consultations, the EU maintained that the Russian measure violates Articles I:1, II:1(a) and (b), III:2, and III:4 of the GATT, as well as Articles 2.1 and 2.2 of the WTO Agreement on Trade-Related Investment Measures (hereinafter, TRIMs Agreement) in conjunction with paragraphs 1(a) and/or 2(a) of the Illustrative List annexed to the TRIMs Agreement.

It appears that the panel eventually entrusted to make a finding on the EU's claims will first need to assess whether the measure falls within the scope of Article II or Article III:2 of the GATT, inasmuch as these provisions are mutually exclusive. In fact, to paraphrase the Panel in *China – Auto parts*, '*a charge cannot be at the same time an 'ordinary customs duty' under Article II:1(b) of the GATT 1994 and an 'internal tax or other internal charge' under Article III:2 of the GATT*'. For purposes of making such determination, reference must be made to *Ad* Article III of the GATT, which establishes that charges that apply to imported and '*like*' domestic goods and that, in respect of imports, are collected at the time or point of importation, constitute '*internal charges*' and are, therefore, subject to the disciplines of Article III of the GATT. Article II:1(b) of the GATT, which prevents WTO Members from imposing, in connection with importation, '*other duties or charges*' in excess of the levels committed under their respective Schedules of Concessions, will be relevant to assess the '*recycling fee*' only if such measure is deemed an '*ordinary customs duty*' or, rather, an

example of '*other duties or charges...imposed on...importation*' (*i.e.*, a '*border measure*') within the meaning of such article.

Conversely, should the '*recycling fee*' be deemed an '*internal tax*' or charge (*i.e*., a '*behind-the-border measure*') under Article III:2 of the GATT, examination of its WTO consistency will involve separate tests under the first and second sentences of Article III:2 of the GATT. Following the Panel in *Canada – Periodicals*, consistency with the first sentence of Article III:2 of the GATT requires that a two-tier test be conducted to determine: 1) whether imported and domestic products are '*like*' products; and 2) whether the imported products are taxed '*in excess*' of the domestic products. WTO case law clarified that relevant factors to determine '*likeness*' between products include the products' end-uses in a given market, their tariff classification, consumers' tastes and habits and the product's properties, nature and quality. With respect to the examination under the second sentence of Article III:2 of the GATT, and in line with the approach adopted by the Panel in *Philippines – Distilled Spirits,* three elements need to be examined: 1) whether the imported and domestic products are '*directly competitive or substitutable*' with respect to each other (*i.e.*, encompassing a wider category than '*like*' products); 2) whether these are '*not similarly taxed*'; and 3) whether this dissimilar taxation is '*applied…so as to afford protection to domestic production*'. According to the EU, the Russian '*recycling fee*' would not successfully pass the tests under Article III:2 of the GATT, first and/or second sentence, which would therefore result in a finding of inconsistency with such provision.

The EU also claims that the '*recycling fee*' appears to violate Article I:1 of the GATT, which prevents WTO Members from discriminating between '*like*' imported goods on the basis of their origin. Lastly, the EU maintains that the '*recycling fee*' could also contradict the national treatment obligation under Article III:4 of the GATT, possibly due to the specific design and progressive nature of such measure, which arguably affords imported products less favourable treatment than that accorded to '*like*' domestic goods. In particular, the EU maintains that the Russian measure embodies trade-related investment measures that are '*mandatory*' and that '*require the purchase...of products of domestic origin*' and/or that '*restrict the importation...of products...related to its local production*', as specified in the Illustrative List in the Annex of the TRIMs Agreement.

These consultations need to be framed within the wider context of the bilateral relations between the EU and Russia, especially since the two trading partners have in place a bilateral trade agreement relevant for the automotive industry (for further background on EU-Russia bilateral relations see Trade Perspectives, Issue No. 14 of 13 July 2012). Moreover, shortly after filing its request for consultations, the EU, backed by the US, raised the issue of the '*recycling fee*' at the meeting of the WTO Council for Trade in Goods of 11 July 2013, where Russia responded that it would provide an answer in due course. In this respect, sources indicate that the Russian regulation may currently be undergoing a lengthy legislative process to be amended, so to eliminate any discrimination. Subsequently, China, Japan, Turkey and the US requested to join the EU in its WTO consultations. In addition, on 24 July 2013, Japan filed a separate request for WTO consultations with Russia, reportedly concerning possible inconsistencies of the '*recycling fee*' with the GATT, the TRIMs Agreement and the Agreement on Technical Barriers to Trade. Although Japan's request for consultations is not yet available, sources suggest that Japan's claims would be focussed on issues of discrimination between '*like*' products originating inside and outside the customs union.

The rapid involvement that the dispute initiated by the EU has gathered from other WTO Members, as well as the fact that the same Russian measure has reportedly given rise to a separate WTO dispute, can be read as an early sign of the considerable commercial impact that these disputes, unless settled at the consultations phase, may have for the affected businesses. For this reason, industries in the EU and in any other vehicle producing country

are advised to carefully monitor any coming developments related to the ongoing WTO consultations.

The EU Parliament's ENVI Committee votes on the EU Commission's proposal on biofuels

On 11 July 2013, the EU Parliament's Committee on the Environment, Public Health and Food Safety (hereinafter, the ENVI Committee) adopted a report on the EU Commission's '*Proposal for a directive of the European Parliament and of the Council amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources*' (hereinafter, the EU Commission's proposal). The EU Commission's proposal aims at amending the '*Fuel Quality Directive*' (*i.e*., *Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EE*) and the '*Renewable Energy Directive*' (*i.e*., *Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC*), and seeks to minimise the impact of the indirect land use change (hereinafter, ILUC) on greenhouse gas emissions (*i.e.*, those created as a result of increased land demand for the production of biofuels, where such land could have been used for food, feed or fibre production) (see Trade Perspectives, Issue No. 17 of 21 September 2012).

After the EU Commission transmitted the proposal to the EU Parliament in October 2012, the competent committee (*i.e*., the ENVI Committee) discussed and adopted its report. In particular, the *rapporteur* within the ENVI Committee, MEP Corinne Lepage, drafted a report where she suggested a number of amendments to the EU Commission's proposal. In addition, other MEPs tabled further amendments to the proposal, which were discussed at the committee-level. The report, adopted by the ENVI Committee on 11 July 2013, will be presented before the EU Parliament's plenary sitting in September 2013, so that it will constitute the basis for the plenary's debate and vote, in accordance with the ordinary legislative procedure (formerly co-decision).

It is recalled that the EU Commission's proposal envisages a primary distinction between '*first generation biofuels*' (or '*conventional biofuels*', originating from food crops) and '*advanced biofuels*' (which originate from alternative sources such as forest residues, *algae* or municipal waste). On this basis, the amendments reportedly voted by the ENVI Committee suggest, *inter alia*, that the 5% cap to the contribution of '*conventional biofuels*' to the mandatory target set by the '*Renewable Energy Directive*' (which in relevant part requires that 10% of energy used for transport in the EU by 2020 originate from renewable sources) be raised to 5.5%. This cap would reportedly be coupled with a minimum threshold amounting to a 2% sub-target for '*advanced biofuels*', opened in order to secure a niche in the market for '*advanced biofuels*', inasmuch as they are still being developed. In addition, the ENVI Committee appears to have voted that ILUC be factored-in the calculation of biofuels' overall emissions for the purposes of compliance with the monitoring and reporting requirements under the '*Fuel Quality Directive*' and the '*Renewable Energy Directive*', as envisaged by the EU Commission's proposal.

These amendments contrast with the opinion adopted by the EU Parliament's Committee on Industry, Research and Energy (ITRE Committee), also involved in this procedure, which voted that the 5% cap be raised to 6.5%, and that the ILUC factor not be included in EU Member States monitoring and reporting requirements under the '*Fuel Quality Directive*' and the '*Renewable Energy Directive*'. To quote the opinion drafted by the *rapporteur* of the ITRE Committee, MEP Alejo Vidal-Quadras, '*no mention of the ILUC factor should be included in*

the Directives, not even for a reporting obligation', inasmuch as '*not enough scientific evidence is available to introduce ILUC factors into EU legislation*'. In fact, the approach displayed by the EU Commission in its proposal has given rise to differentiated positions also between EU Institutions. In particular, the opinion of the European Economic and Social Committee (hereinafter, EESC) concluded, in relevant part, that the EU Commission's approach is '*questionable*' and that in any case biofuels are '*no more than a temporary solution*', given their limited availability and therefore their inability to replace fossil fuels in the long run. The EESC further called on the EU Commission to rethink its entire bioenergy policy, especially as far as transportation is concerned. In addition, it suggested that supplementary efforts be placed on a number of elements, including, *inter alia*, the finite nature of land, the energy performance and efficiency of each form of bioenergy and economic efficiency.

In any event, should the EU Commission's proposal come into force, the EU will need to ensure that it complies with WTO rules. In particular, inasmuch as it discourages the use of '*conventional biofuels*' *vis-à-vis* '*advanced biofuels*', the EU Commission's proposal may arguably lead to discrimination between imported '*conventional biofuels*' and '*advanced biofuels*' of foreign or domestic origin, in a manner which is inconsistent with Articles I and III:4 of the of the GATT. In addition, the EU Commission's proposal may arguably fall within the scope of the WTO Agreement on Technical Barriers to Trade, in which case it will also be subject the disciplines laid down therein. The specific trade-distortive features of the EU Commission's proposal, as it currently stands, consist in the 5% limit posed on the contribution that can be made by food crop-based biofuels to the 10% target set by the '*Renewable Energy Directive*'; as well as the incentives granted to '*advanced biofuels*' *vis-à-vis* '*conventional biofuels*'. The specific estimated ILUC emissions factors attributed to biofuels on the basis of the feedstock employed for their production will be relevant, until 2020, for monitoring purposes only. However, it is clear that the distinction operated between biofuels on the basis of the estimated ILUC emissions they generate is among the core features of this proposal, and will likely be factored into the calculation of the overall '*environmental impact*' (calculated in greenhouse gas emissions) of biofuels once the '*transition*' phase terminates (*i.e*., after 2020).

It remains to be seen how the plenary sitting of the EU Parliament and other relevant EU Institutions will react to the draft text, and how the amendments proposed along the way will affect the original proposal of the EU Commission. Throughout this process, attention should also be paid to developments in other *fora* that also stand to impact the outcome of the proposed directive, such as the ongoing WTO consultations requested by Argentina in relation to the EU framework on renewable energy (see Trade Perspectives, Issue No. 11 of 31 May 2013). In this respect, it is recommended that all actors involved in trade in biofuels and related commodities closely monitor all developments within the relevant *fora* and ensure that their interests are duly represented at all instances, inasmuch as the proposal at hand stands to bring substantive changes to the EU and international trade in biofuels.

Hungary intends limiting trans fats in foodstuffs, as done by other EU Member States

On 6 July 2013, Hungary notified to the EU Commission a draft *Decree of the Ministry of Human Resources on the highest permitted amount of trans fats in food products, the conditions of, and inspections by, the authorities on the distribution of food products containing trans fats and the rules for tracking the population's consumption of trans fats* (*Az emberi erőforrások minisztere az élelmiszerekben lévő transz-zsírsavak megengedhető legnagyobb mennyiségéről, a transz-zsírsav tartalmú élelmiszerek forgalmazásának feltételeiről és hatósági ellenőrzéséről, valamint a lakosság transz-zsírsav bevitelének nyomon követésére vonatkozó szabályokról,* hereinafter, the draft Decree*).* The notification was made under Articles 8-10 of *Directive 98/34/EC of the European Parliament and of the*

Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (*i.e.*, under the procedure that imposes an obligation on EU Member States to notify the EU Commission and the other EU Member States of all draft technical regulations concerning products before they are adopted in national law, to provide transparency and to avoid unjustified barriers between EU Member States).

The '*Brief Statement of Grounds*', which accompanied the Hungarian notification of the draft Decree, states, *inter alia*, that health protection and prevention of cardiovascular diseases are among the Hungarian Government's main aims and that the key to preventing chronic diseases is reducing or eliminating major nutritional risk factors, including the intake of trans fats, which have been proven to increase the risk of cardiovascular diseases.

According to § 3(1) of the draft Decree, it is forbidden to place on the market food products in which the amount of trans fats exceeds 2 g for every 100 g of the total fat content of food products provided or sold to end-consumers. § 2(b) of the draft Decree defines '*trans fat*' as a '*fatty acid containing at least one double carbon-carbon bond of a non-conjugated trans configuration*'. For processed food products consisting of multiple ingredients, the draft Decree establishes that the prohibition in § 3(1) of the draft Decree does not apply if: (a) the total fat content of the food product is lower than 20% (in this case, the amount of trans fats may not exceed 4 g for every 100 g of the total fat content of said food product); or (b) the total fat content of the food product is lower than 3% (in this case, the amount of trans fats may not exceed 10 g for every 100 g of the total fat content of said food product). Finally, the draft Decree provides for an obligation on food manufacturers and distributors (of imported food) to keep records, including the trans fat content of raw materials containing trans fats (in particular, oils, fats and fat emulsions), which have been used as ingredients when producing food to be provided or sold to end-consumers or used during the manufacturing process.

A number of EU Member States (*i.e.*, Austria and Denmark) and other European countries (*i.e.*, Iceland and Switzerland) have already adopted similar limitations of trans fats in food. As to the maximum permitted amount of trans fats in fats and oils in foodstuffs, the draft Decree appears to be in line with the Danish *Executive Order No. 160 of 11 March 2003 on the Content of Trans Fatty Acids in Oils and Fats (BEK nr. 160 Transfedtsyrebekendtgørelsen*) and the Austrian *Ministerial Decree No. 267 of 20 August 2009 on trans fat content in food (267. Verordnung des Bundesministers für Gesundheit über den Gehalt an trans-Fettsäuren in Lebensmitteln)*, both of which provide that the content of trans fats in the oils and fats shall not exceed 2 g per 100 g of oil or fat. Also the definition of trans fats in the draft Decree appears to be in line with the Austrian and Danish legislation, in that certain trans fatty acids, such as conjugated linoleic acid (CLA) are excluded from the limitations specified. Differently from what the draft Decree appears to establish, the Danish Order and the Austrian Decree explicitly state that naturally occurring content of trans fatty acids in animal fats is not covered by the legislation.

10 years after its entry into force, the Danish Ministry for Agriculture, Food and Fisheries claims that the legislation limiting trans fats has not resulted in significant adjustment problems in the industry and no problems have been reported when it comes to the substitution of trans fats with other types of fats. The substitution has apparently also not caused any significant rise in the price of the involved commodities of food. Investigations carried out for the Danish Ministry for Agriculture, Food and Fisheries on the trans fat content in foods sold in Denmark showed that the level of industrially produced trans fats in food products has gradually declined and the desired effect of the Danish regulation has been obtained. Comparisons of the fatty acid profiles have shown that, in 68% of the products, industrially produced trans fatty acids have mainly been substituted with saturated

fatty acids (the source of saturated fatty acids being, in most cases, either coconut fat or palm oil).

The prohibition of placing on the market food products in which the amount of trans fats exceeds 2 g for every 100 g of the total fat content of food products appears to have become the standard in the legislation of certain EU Member States. The provision in the draft Decree that this prohibition not apply, if the total fat content of the food product is lower than 20% (in this case, the amount of trans fats may not exceed 4 g for every 100 g of the total fat content of said food product) or if the total fat content of the food product is lower than 3% (in this case, the amount of trans fats may not exceed 10 g for every 100 g of the total fat content of said food product), is mirrored from § 2(2) of the Austrian Decree, but does not appear to be provided for in the Danish legislation. Also the obligation on food manufacturers and distributors (of imported food) to keep records, which is established in the draft Decree (including the trans fat content of raw materials containing trans fats, in particular, oils, fats and fat emulsions, which have been used as ingredients when producing food to be provided or sold to end consumers or used during the manufacturing process), appears to be an element of novelty and it should be analysed whether this record-keeping obligation is too burdensome for manufacturers and distributors.

In 2005, the EU Commission initiated infringement proceedings against Denmark contending that the Danish legislation on trans fats was a barrier to trade for other EU Member States. The Danish Government maintained that, from a health point of view, the legislation was legitimate and forwarded extensive scientific documentation to confirm this. In March 2007, the EU Commission decided to withdraw its case against Denmark. The prohibition of placing on the market food products in which the amount of trans fats exceeds 2 g for every 100 g of the total fat content of food products appears to be scientifically justified. However, the current situation, where some of the smaller EU Member States are adopting national measures with slightly different requirements, may lead to a fragmentation of the EU internal market and to (*de facto*, if not *de jure*) trade barriers. On request by the EU Commission, the European Food Safety Authority has already produced a scientific opinion on trans fats. The question is when the EU Commission will be acting by introducing a harmonised prohibition of industrial trans fats or at least strict labelling rules. The draft Decree is now on standstill until 7 October 2013 to give the EU Commission and other EU Member States time to comment.

Recently Adopted EU Legislation

Trade Remedies

- *Council Implementing Regulation (EU) No. 695/2013 of 15 July 2013 imposing a definitive anti-dumping duty on imports of ironing boards originating in the People's Republic of China, and repealing the anti-dumping measures on imports of ironing boards originating in Ukraine following an expiry review pursuant to Article 11(2) and a partial interim review pursuant to Article 11(3) of Regulation (EC) No. 1225/2009*

Other

- *Commission Regulation (EU) No. 691/2013 of 19 July 2013 amending Regulation (EC) No. 152/2009 as regards methods of sampling and analysis*

- *Commission Implementing Regulation (EU) No. 672/2013 of 15 July 2013 amending Regulation (EU) No. 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing*

- *Commission Regulation (EU) No. 655/2013 of 10 July 2013 laying down common criteria for the justification of claims used in relation to cosmetic products*

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Please note that Trade Perspectives© will take an editorial break during the WTO's August recess and will resume its fortnightly publication schedule on 6 September 2013. We thank you for your continued interest in Trade Perspectives© and look forward to starting again with renewed energy and enthusiasm our dialogues on international trade as of this Fall.

The Trade Perspectives© Team

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