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The EU Commission releases its blueprint for an EU trade policy

With the Communication entitled '*Trade, Growth and World Affairs*' released on 9 November 2010, the EU Commission has set out its trade policy priorities for the next five years (*i.e.*, from 2010 to 2015). The Commission's vision incorporates external trade policy as the core component of the EU's 2020 strategy to become, in the words of the Commission, a '*smart, sustainable and inclusive economy*'. According to the Communication, the EU's trade policy must be aimed at fostering EU economic growth, create jobs and increase consumers' choices.

The bases of this new trade policy blueprint are: the report on '*Progress achieved on the Global Europe strategy 2006-2010*'; the working paper '*Trade as a driver of prosperity*'; and a public consultation on EU trade policy. In particular, the report on the progress achieved on the Global Europe strategy (*i.e.*, the EU Commission's previous trade policy document) assesses its achievements, identifies the remaining barriers to trade and points at the need for continuity with such policies, to be coupled with policies aimed at opening further global markets. The working paper released by the Commission explains the relation between trade openness, economic growth and job creation, offering alternatives to manage the adjustment costs of eventual sectors or areas that may be affected by the reforms. Lastly, the outcome of the public consultation on the future direction of the EU trade policy launched by the EU Commission indicated the priorities of a wide group of stakeholders within the EU. These are, *inter alia*, to create job opportunities, offer to consumers the widest choice of products at the lowest price, ensure that the same trade rules are applied equally worldwide and support environmental standards as well as developing countries. Together, the discussion papers support further opening of the EU market, coordinated with the opening of its trade partners' markets so as to enable economic growth and job creation within the EU.

The EU Commission's proposed strategy is directed at reducing trade barriers, opening global markets and getting '*a fair deal*' for European businesses. The Commission proposes to achieve this by: (1) pursuing an active negotiating agenda; (2) deepening strategic partnerships; (3) increasing the opportunities arising from trade in relation to jobs, development and business; and (4) enforcing EU rights.

In particular, the Commission calls for an active negotiating agenda at the multilateral and bilateral levels. The Commission emphasises the '*central role of multilateral trade liberalisation and rulemaking*' and to this end it views the conclusion of the Doha Round as a '*top priority*', which is committed to achieve by the end of 2011 at the latest. However, on the basis that the Doha agreement will not address the issues that global trade rules ought to take care of, the blueprint also proposes the creation of a group of qualified people from developing and developed countries to obtain independent recommendations to help shape the EU's view on the future agenda and functioning of the WTO post-Doha. At the bilateral level, the emphasis is

given to the engagement in new Free Trade Agreements (FTAs), as well as to the conclusion of negotiations that were already started with key partners, such as certain countries part of the Association of Southeast Asian Nations (ASEAN is composed of Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam), the Mercosur region (composed of Argentina, Brazil, Paraguay and Uruguay), the Euromed region (comprising Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria, Tunisia, and Turkey), the Gulf Cooperation Council (which includes the United Arab Emirates, the Kingdom of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, Qatar and Kuwait), India, Ukraine, and Canada. Self-standing investment agreements with key partners are also part of the policy. The agenda for the proposed agreements, includes, *inter alia*, regulatory barriers in goods, services and investment, intellectual property rights, government procurement, the protection of innovation and sustainable development (*e.g.*, labour conditions and environmental protection).

With the aim of deepening the EU's strategic partnerships, the Commission suggests a closer relationship with Brazil, China, India, Japan, Russia and the United States. Whereas in relation to Brazil and India the commercial ties will be deepened through the conclusion of the ongoing FTA negotiations (in relation to Brazil, these negotiations are being conducted at a regional level within the Mercosur), for the other strategic partners, the Commission is proposing, for the moment, to upgrade cooperation with these countries through the existing *fora* established for that purpose, such as the Trans-Atlantic Economic Council with the US and the High Level Economic Dialogue with China, providing the framework for trade and regulatory dialogues, the EU-Russia Partnership and Cooperation Agreement negotiations and the High Level Group established at the last EU-Japan Summit.

Creating opportunities for jobs and promoting business and development through trade is the third element of the Commission's strategy, in relation to which the Commission suggests the elaboration of several initiatives in the course of next year. The development of a legislative proposal for an EU instrument to help secure and increase symmetry in access to public procurement markets within developed and large developing countries is one of the initiatives that will be proposed. According to the EU Commission, public procurement contracts constitute business opportunities in sectors where EU the industry is highly competitive, such as public transport, medical devices, pharmaceuticals and green technologies. Therefore, symmetric access to public procurement procedures for EU companies is also an important tool of business promotion and creation of job opportunities. Another proposal that will be introduced having a direct impact on international trade is the reform of the Generalised System of (trade) Preferences for developing countries, to be complemented by the adoption of a Commission Communication on trade and development. Both development proposals will emphasise the idea of a '*sustainable*' and '*inclusive*' economic growth as pursued by the '*EU 2020 strategy*', while efforts to conclude the Economic Partnership Agreements with African Countries and the Pacific will continue.

Lastly, the enforcement of EU rights focuses mainly on market access and protection of intellectual property rights (hereinafter, IPR) in third countries; access to key raw materials for EU industries; and securing reliable energy supplies. The Commission will produce a report in 2011 to monitor trade barriers and protectionist measures with a view to trigger the appropriate enforcement instruments and trade defence measures, including anti-dumping and countervailing measures. Recourse to the WTO dispute settlement system is also mentioned as an important tool to defend the EU's interests. In this respect, it is recalled that the EU has already triggered the WTO dispute settlement mechanism in relation to export restrictions on certain raw materials allegedly applied by China. The Communication mentions also the revision

of the Commission's strategy of IPR enforcement in third countries and the revision of the relevant customs procedures for IPR enforcement at the EU border. In this regard, the finalisation and implementation of the Anti-Counterfeiting Trade Agreement, among other negotiations, appears to stand as a priority for the EU.

Whereas the new EU blueprint for trade policy indicates that the new trade strategy will substantially be in line with the previous strategy framed in the 2006 Global Europe communication, particular emphasis is being put by the Commission on enhancing market access for EU businesses, addressing unfair trade and fighting discrimination, to be pursued at multilateral and bilateral level, including through regulatory dialogues, as well as through the enforcement of EU rights. The EU claims to continue attributing a central role to multilateralism and to the strengthening of the existing multilateral rules, in line with its interest as the world's largest trading bloc. The opening of services markets where the EU is highly competitive, as well as the protection of investments, are likely to be reinforced in bilateral agreements already under negotiation through deeper commitments of the EU's key trade partners. Access to public procurement for EU companies is being pursued both at the bilateral and multilateral level, in the framework of the WTO Government Procurement (currently a plurilateral agreement). The trends in the future of EU trade policy indicate the importance for the business industry to observe the evolution of trade issues and to constantly interact with the EU institutions to defend and pursue their immediate commercial interests.

Which risk assessments are being used for the establishment of the EU list of permitted flavouring substances?

On 9 November 2010, the European Food Safety Authority (hereinafter, EFSA) announced that it has completed the first stage of a comprehensive safety review of 2,067 flavouring substances used in the EU. EFSA's scientific panel on flavourings found that 1,667 assessed flavouring substances do not give rise to safety concerns, while manufacturers of the flavouring substances have been asked to provide further data on around 400 substances to allow EFSA to complete the evaluations. EFSA states that this does not necessarily mean that these substances pose a risk to health, but just that further information is needed in order to complete the safety assessments. These assessments do not include smoke flavourings regulated by Regulation No. (EC) 2065/2003.

Taking under consideration EFSA's opinions, the EU Commission will establish a list of flavouring substances which can continue to be used in the EU, according to Regulation (EC) No. 1334/2008 of the European Parliament and of the Council on flavourings and certain food ingredients with flavouring properties for use in and on foods, which repeals Council Directive 88/388/EEC and Commission Directive 91/71/EEC as from 20 January 2011. Regulation (EC) No. 1334/2008 lays down general requirements for safe use of flavourings and lists the flavourings and source materials for which a safety evaluation and approval is required. Regulation (EC) No. 1334/2008 also sets out the rules for labelling of flavourings from business to business and for sale to the final consumers, and describing the specific requirements for use of the term '*natural*'. In order to ensure harmonisation, the risk assessment and approval of flavourings and source materials that need to undergo an evaluation should be carried out in accordance with the procedure laid down in Regulation (EC) No. 1331/2008 of the European Parliament and of the Council establishing a common authorisation procedure for food additives, food enzymes and food flavourings.

Already in 2008, EFSA had communicated that one flavouring substance (i.e., isoprene, or 2-methyl-1,3-butadiene) should not be further evaluated as its safety had been questioned, given its genotoxic potential and carcinogenic effects in experimental animals. The outstanding 400 flavour substances have apparently all been approved by the Joint WHO/UN Expert Committee on Food Additives (JECFA). However, in some cases, EFSA has questioned JECFA's *modus operandi* or data. In one of the latest batches of assessments (i.e., aliphatic branched-chain saturated and unsaturated alcohols, aldehydes, acids, and related esters), EFSA agreed (for 20 of the 22 substances being considered) with the way the assessments have been performed by the JECFA. However, EFSA considered that for two substances (i.e., FL-no: 05.148 and 08.079) JECFA's evaluation is only based on MSDI (i.e., maximised survey-derived intake) values derived from US production figures, while EU production figures are required.

The JECFA is an international expert scientific committee that is administered jointly by the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO). It has been meeting since 1956, initially to evaluate the safety of food additives. Its work now also includes the evaluation of contaminants, naturally occurring toxicants and residues of veterinary drugs in food. In its 73rd meeting (on 8 - 17 June 2010 in Geneva), the JEFCA drew from the experience of 27 scientists from 12 countries and, *inter alia*, evaluated 179 flavouring agents by the Procedure for the Safety Evaluation of Flavouring Agents, with the result that for 164 of them there was no safety concern, while for 15 of them additional data was required in order to complete the evaluation.

The question is what will happen when EFSA diverges in its risk evaluation (and the EU Commission in its risk assessment) vis-à-vis the risk assessments carried out by the JECFA. In such instance, the flavouring substances will be deemed unsafe and a trade matter looks posed to arise with respect to products using these flavourings, which can then no longer be used in the EU. In relation to concerns, in particular from non-EU stakeholders, as to why the EU authorities cannot accept the evaluation of the JECFA on the outstanding flavourings, the EU Commission argues that all flavouring substances currently available for use in the EU have been independently assessed for safety at European level based on the latest available scientific data and according to the same rigorous criteria, taking into account Codex and JECFA. However, the ultimate reference in the EU must always be EFSA.

In this context, it must be underlined that, from a trade perspective, the WTO Agreement on Sanitary and Phytosanitary Measures promotes the use of harmonised sanitary and phytosanitary measures between WTO Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including, *inter alia*, the Codex Alimentarius Commission. However, this does not require WTO Members to change their appropriate level of protection of human, animal or plant life or health. Further to the safety evaluation of existing flavouring substances, EFSA will start assessing applications for the authorisation of new flavourings, based on new guidelines drawn up through stakeholders' consultation. As to the safety evaluation of these new flavouring substances, it is likely that EFSA will give ultimate guidance to the EU Commission without accepting possibly diverging JEFCA risk assessments. The application of different standards by different risk assessment bodies appears as having the potential for trade implications and commercial frictions with EU trading partners.

The WTO panel issued its report in the dispute *Thailand – customs and fiscal measures on cigarettes from the Philippines*

On 15 November 2010, a WTO panel issued its report in the dispute *Thailand – customs and fiscal measures on cigarettes from the Philippines*. The panel found that Thailand's customs valuation practices and internal tax regimes discriminate against imported cigarettes and are not transparent, resulting in inconsistency with the WTO agreements, notably with Articles III:2, III:4, X:1 and X:3(a) of the GATT and several provisions of the WTO Agreement on Implementation of Article VII of the GATT 1994 (hereinafter, 'the Customs Valuation Agreement'). The Philippines' complaint targeted a number of fiscal and customs measures applied by Thailand affecting cigarettes from the Philippines: in particular, Thailand's customs valuation practices, excise tax, health tax, TV tax, VAT regime, retail licensing requirements and import guarantees imposed upon cigarette importers.

Inter alia, the Philippines claimed that, as of 2006, Thai Customs rejected the transaction value declared by importers on entries of imported cigarettes as the basis for valuation, to apply, instead, arbitrarily pre-determined values that were higher than the declared transaction values. According to the Philippines, Thai Customs allowed the importer to withdraw the subject goods from customs only if the importer made a payment on the basis of the declared transaction value and deposited a guarantee of customs duties covering the difference between the declared transaction value and the applicable pre-determined value. Subsequently, Thai Customs issued a final assessment of customs value that was higher than the declared transaction value and that reflected the applicable pre-determined value, which was changed from time to time. The Philippines argued that such conducts were being put in place pursuant to, *inter alia*, a general rule and/or methodology providing for the systematic rejection of transaction value and the imposition of a higher pre-determined value and a number of individual determinations made by Thai Customs for entries of cigarettes exported from the Philippines and entered between 4 August 2006 and 17 March 2008 and other measures. Therefore, the Philippines argued that Thailand's measures relating to/allowing this conduct, as specified in its request for the establishment of a panel, violated a number of articles of the Customs Valuation Agreement.

Moreover, the Philippines argued that, because these excessive customs values serve as the tax basis for imposing the excise tax, the health tax and the television tax, Thailand imposes a higher tax burden on imported products than on like and/or directly competitive or substitutable domestic products, inconsistently with Article III:2, first and second sentence, of the GATT. In relation to the VAT, the Philippines argued that under Thailand's fiscal regime, VAT on cigarettes is calculated by reference to brand-specific maximum retail selling prices ('MRSPs') which are determined by the Thai Government through executive acts applying solely to domestic cigarettes, and separate executive acts applying solely to imported cigarettes. According to the Philippines, the MRSPs for imported brands of cigarette, including those exported by the Philippines, are set at significantly higher levels than the MRSPs for like and/or directly competitive or substitutable domestic brands. Moreover, the MRSPs for imported cigarettes are set significantly above the actual retail selling price of those cigarettes, whereas the MRSPs for domestic cigarettes are set at the level of the actual retail selling price of those cigarettes. The Philippines claimed that the higher MRSPs for imported products result in higher fiscal burdens for these products than for like and/or directly competitive or substitutable domestic products, and thereby afford protection to domestic products, in a manner which is inconsistent with Article III:2, first and second sentence, of the GATT. Lastly, according to the Philippines, Thailand imposes different VAT-related requirements on wholesale and retail sellers

of cigarettes, depending on whether they sell domestic or imported products. According to the Philippines, sellers are subject to VAT when they sell imported products, but are exempted when they sell like and/or directly competitive or substitutable domestic products. Moreover, because wholesale and retail sellers of imported cigarettes are subject to VAT, whereas wholesale and retail sellers of domestic cigarettes are not, the former are also subject to VAT administrative requirements that are not imposed on sellers of the like and/or directly competitive or substitutable domestic product. The Philippines considers that these measures are inconsistent with Articles III:4 and III:2, first and second sentence, of the GATT.

The panel upheld some of the claims put forward by the Philippines. In particular, in relation to the claims under the WTO Customs Valuation Agreement, the panel rejected the argument that Thailand maintained a general rule requiring the rejection of the transaction value. However, with respect to the claims under Article X:1 of the GATT, which provides for the publication of trade regulations, the panel decided that Thailand failed to publish the general methodology for determining the tax bases for imported cigarettes and '*to enable governments and traders to become acquainted with it under Article X:1.'* In addition, the general rules on the right to the release of guarantees in relation to the excise, health and television taxes were considered not to be sufficiently published to satisfy the requirements under Article X:1 of the GATT. Moreover, the Article X:3(a) of the GATT states that '*each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article*.' Concerning the customs valuation regime administration, Philippines claimed that the following measures were in violation of the Article X:3(a) of the GATT: the appointment of certain Thai Government's customs and tax officials as directors of a domestic cigarette company; and delays in the decision-making concerning appeals against Thailand's customs valuation determinations. However, not all the measures were considered to be impartial and unreasonable by the panel, which upheld the Philippines' arguments only in relation to the administrative review process of customs valuation decisions. The panel found that the overall delays in the review process resulted in administration of Thai customs law in an *unreasonable* manner, in violation of Article X:3(a) of the GATT.

Concerning Article III:2, first sentence, of the GATT, the panel found that the VAT regime is an internal tax applied to imported cigarettes in excess of those applied to cigarettes manufactured in Thailand. The panel affirmed that the general methodology for determining the VAT tax base was not followed by the Thai excise duty with respect to imported cigarettes, since the calculation resulted in higher tax bases for imported cigarettes, determined according to separate and different executive acts from those applied to the calculation of the tax basis of domestic cigarettes. This difference in the calculation resulted in marketing costs for the imported cigarettes being higher than they would have been if the general methodology, applied to domestic cigarettes, had been followed. Under the same Article III:2, first sentence, of the GATT, the panel stated that the exemption from the VAT for domestic cigarettes, provided in Thailand's laws and regulations in the form of automatic and irrevocable tax credits, qualifies as excess taxation to imported cigarettes, since this offset of tax liabilities is not incurred by the retailers of imported cigarettes in every case. The panel concluded that the requirements for the resellers of imported cigarettes to take further procedures (*i.e.,* file the form of VAT tax report (form '*Por.Por 30*') and prove the actual purchase of imported cigarettes), so as to be granted with tax credits offsetting the liability of the VAT, offer a possibility or risk of discriminatory treatment against imported cigarettes. Based on precedent WTO cases, the panel affirmed that '*mere possibility or risk*' of discriminatory treatment in '*certain defined circumstances*' is enough to qualify a discriminatory treatment under Article III:2, first sentence, of the GATT. Therefore, to the extent that the VAT exemption is not automatic vis-à-vis imported cigarettes and the fact that other possible sanctions for not filling the form are imposed only to imported cigarettes, the

panel found that the VAT ('*internal tax*') applied to the imported cigarettes is in excess of that applied to the domestic cigarettes.

Furthermore, the panel upheld the Philippines' argument that Thailand's VAT regime is discriminatory and inconsistent with Article III:4 of the GATT to the extent that the imported cigarettes are subject to additional administrative requirements and penalties, which adversely affect the conditions of competition of imported cigarettes when compared to the domestic cigarettes. The requirement to complete and submit the form '*Por.Por 30*' by the resellers with information regarding only the imported cigarettes transactions was considered more burdensome when compared to the administrative requirements applied to the domestic cigarettes, as the exemption from the VAT for domestic cigarettes, according to the panel, does not require any declaration on the VAT tax report. From this requirement to complete the VAT tax reports (form '*Por.Por 30*'), it derives another obligation of record keeping of documents related to the transactions of purchase of imported cigarettes, obligation which does not exist for the resellers of domestic cigarettes. Therefore, the administrative requirements are more burdensome to the resellers of imported cigarettes, resulting in overall less favourable treatment to imported cigarettes than that accorded to domestic cigarettes. In this respect, Thailand alleged that, even if the administrative requirements were considered to be in violation of Article III:4 of the GATT, these requirements, as well as the penalty provisions, justifiable under Article XX(d) of the GATT as they are necessary to secure compliance with Thailand's VAT laws. According to Thailand*, 'this is because the filing obligations are the only way to verify that importers comply with the VAT laws.'* However, the panel found that '*Thailand has not discharged its burden of showing that the administrative requirements and the imposition of penalties for failure to complete VAT filing requirements are necessary to secure compliance with the Thai VAT laws within the meaning of Article XX(d) of the GATT 1994.*'

The decision by the WTO panel emphasised the negative effects of customs valuation practices and tax regulations on the conditions of competition of imported cigarettes compared to the domestic cigarettes in the context of the cigarettes' market in Thailand. Considering the commercial interests of the cigarette industries, attention should be given to the next steps of the ongoing dispute. The panel's findings can be appealed by both parties within 60 days of the date of its circulation. Unless the parties appeal to this decision or there is a consensus by the WTO Members not to adopt it, the panel report recommendations for Thailand to bring its measures in compliance with the WTO agreements shall be adopted and will have to be implemented.

Recently Adopted EU Legislation

- *Commission Regulation (EU) No 1040/2010 of 16 November 2010 amending Annex V to Council Regulation (EC) No 1342/2007 as regards the quantitative limits of certain steel products from the Russian Federation*

- *Commission Regulation (EU) No 1041/2010 of 16 November 2010 amending Regulation (EU) No 479/2010 laying down rules for the implementation of Council Regulation (EC) No 1234/2007 as regards Member States' notifications to the Commission in the milk and milk products sector*

- *Commission Regulation (EU) No 1042/2010 of 16 November 2010 imposing a provisional anti-dumping duty on imports of coated fine paper originating in the People's Republic of China*

- *Commission Regulation (EU) No 1035/2010 of 15 November 2010 imposing a provisional anti-dumping duty on imports of melamine originating in the People's Republic of China*

- *Commission Regulation (EU) No 1036/2010 of 15 November 2010 imposing a provisional anti-dumping duty on imports of zeolite A powder originating in Bosnia and Herzegovina*

- *Commission Regulation (EU) No 1021/2010 of 12 November 2010 entering a name in the register of protected designations of origin and protected geographical indications [Peperone di Pontecorvo (PDO)]*

- *Commission Regulation (EU) No 1023/2010 of 12 November 2010 entering a name in the register of protected designations of origin and protected geographical indications (Jambon de l'Ardèche (PGI))*

- *Commission Regulation (EU) No 1024/2010 of 12 November 2010 entering a name in the register of protected designations of origin and protected geographical indications (Farine de châtaigne corse/Farina castagnina corsa (PDO))*

- *Commission Regulation (EU) No 1025/2010 of 12 November 2010 entering a name in the register of protected designations of origin and protected geographical indications (Kalix Löjrom (PDO))*

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