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The EU Commission proposes that EU Member States be able to '*opt-out*' from GM food and feed authorisations

On 22 April 2015, the EU Commission adopted a package on the authorisation of genetically modified organisms (hereinafter, GMOs) as food and feed in the EU. The package consists of the Communication *Reviewing the decision-making process on genetically modified organisms* and the *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1829/2003 as regards the possibility for the Member States to restrict or prohibit the use of genetically modified food and feed on their territory* (hereinafter, the Proposal).

GMOs are organisms whose genetic characteristics have undergone artificial modification. The EU has a legal framework in place that concerns the authorisation, traceability and labelling of GMOs. In relevant part, this framework is found in *Regulation (EC) No. 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed* and *Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC*. The Proposal seeks to amend the former instrument, which covers food, food ingredients and feed containing or consisting of GMOs (*i.e.*, GM food and feed). Conversely, the latter instrument concerns GMOs for uses other than food and feed (notably, cultivation).

In essence, the Proposal seeks to allow EU Member States to decide whether a GM food or feed that has been authorised at the EU-level, is to be authorised on their national markets. This scheme intends to address the situation where, over the years, a large number of safeguard and emergency measures have been adopted by EU Member States against authorised GM food and feed.

Under the current framework, an application for GM food and feed must be first submitted to the competent authority in an EU Member State, which forwards it to the European Food Safety Authority (hereinafter, EFSA) for the scientific risk assessment. Within three months of EFSA's opinion, the EU Commission prepares a draft implementing act granting or refusing the authorisation of the given GM food or feed. Although the EU Commission is not bound by EFSA's opinion, it must justify its position if it diverges from it. The EU Commission's draft implementing act is then voted by EU Member States under a qualified majority rule. If EU Member States fail to adopt the decision, the applicable rules compel the EU Commission to adopt it within a given timeframe. Since the entry into force of this framework, mostly due to societal concerns in certain parts of the EU, EU Member States have been systematically

unable to reach the necessary majority to adopt any such draft act. Approval by the EU Commission, despite the result of the vote, has therefore become the general rule in GM food and feed authorisations.

In this context, the Proposal seeks to address the discrepancies between EU Member States' will and the authorisations ultimately granted by the EU Commission. In fact, the approach embodied in the Proposal mirrors the recently adopted scheme for GMO cultivation. In that case, *Directive (EU) 542/2015 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC* allows individual EU Member States to restrict or prohibit the cultivation of GMOs in their territory (see Trade Perspectives Issue No. 2 of 23 January 2015).

The Proposal (which does not concern, *inter alia*, GMOs for cultivation) foresees that EU Member States be able to restrict or prohibit the use, in all or part of their territory, of GM food and feed authorised at the EU level. EU Member States may adopt '*opt-out*' measures on the basis of criteria other than the GMOs' effects on health and/or the environment, which have already been addressed by EFSA's risk assessment. In addition, such measures must be reasoned, based on compelling grounds in accordance with EU law, proportional and non-discriminatory. In fact, '*opt-out*' measures must be in line with Article 34 of the Treaty on the Functioning of the European Union (*i.e.*, TFEU), which prohibits quantitative restrictions and measures having an equivalent effect. These measures need to be justifiable under Article 36 of the TFEU, which provides for an exception to the prohibition of quantitative restrictions on specific grounds and provided that these restrictions do not constitute a means of arbitrary discrimination or a disguised restriction to trade. This provision foresees that measures be justified on grounds of public morality, public policy and public security, *inter alia*.

The EU's international obligations (including those stemming from the WTO) will also apply to the scheme embodied by the Proposal (once it is in force), as well as to any restriction that EU Member States adopt pursuant to it. Accordingly, any WTO Member will be able to request an assessment of the compatibility of such measures with WTO law. In fact, the EU's GMO regime was already found to contravene WTO law in the context of the *EC – Biotech* dispute. In 2003, the US, Canada and Argentina challenged the system for the approval of GM products in the EU and the safeguard measures imposed by several EU Member States affecting the importation and marketing of certain products. In relevant part, the panel found that the EU (at that time, European Communities) was in violation of the WTO Agreement on Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement), insofar as it applied a *de facto moratorium* leading to undue delays on the approval of biotech products. The panel also found that the EU Member States' safeguard measures were not based on a risk assessment within the meaning of Article 5.1 of the SPS Agreement, breaching also Article 2.2 of the same agreement.

The findings of the *EC – Biotech* dispute provide useful guidance when anticipating issues that could be raised in the context of a potential WTO challenge against the EU's proposed framework. An important issue concerns the applicability of the SPS Agreement to the several measures at stake. In *EC – Biotech*, the panel found that the EU's decision to apply a *de facto moratorium* did not constitute a SPS measure, inasmuch as it was "*a decision concerning the application, or operation, of procedures*" and "*as such, it did not provide for 'requirements [or] procedures' within the meaning of Annex A(1) [of the SPS Agreement]*". Accordingly, the panel dismissed the claims against the EU's decision to apply a *moratorium*. Nonetheless, the panel established that, as a result of the *moratorium*'s application, the EU contravened Annex C (and, thereby, Article 8) of the SPS Agreement. In particular, the panel ruled that the *moratorium* led to "*undue delays*" in the completion of the approval procedures for specific GMOs, which had been found to constitute SPS measures.

Arguably, a potential panel examining the WTO-consistency of the EU's proposed framework could apply a similar reasoning and find that the EU-wide measure, despite not being an SPS measure, could still, as a result of its application, violate the SPS Agreement. If in line with the Proposal, the possible national restrictions will not be based on risks for health or the environment (the Proposal requires that they be based on grounds "*which shall, in no case, conflict with the risk assessment*"). Therefore, national measures appear likely to fall outside the scope of the SPS Agreement. In *EC – Biotech*, the panel found that safeguard measures imposed by EU Member States were covered by the SPS Agreement but, in that case, such measures were typically based on grounds related to human health or the environment.

The EU's proposed framework may also arguably affect the EU's obligations under the General Agreement on Tariffs and Trade (*i.e.*, GATT), which prohibits, *inter alia*, that WTO Members adopt import prohibitions or restrictions (under Article XI). However, the GATT also provides for a general exception that operates under certain conditions and on several grounds, notably "*to protect public morals*" (Article XX(a)); "*to protect human, animal or plant life or health*" (Article XX(b)); and for "*the conservation of exhaustible natural resources*" (Article XX(g)). Considering the reasons under which the Proposal foresees that national '*opt-out*' measures be based, it cannot be ruled-out that the EU may invoke this provision in order to justify its measures. A draft document produced by the EU Commission in the context of the legislative procedure of the scheme allowing EU Member States to '*opt-out*' from GMO cultivation, suggested that several subparagraphs of Article XX of the GATT could provide grounds to defend the WTO-compatibility of national restrictions (see Trade Perspectives Issue No. 3 of 11 February 2011). In addition, should the SPS Agreement not be applicable, the relevant measures could be assessed under the WTO Agreement on Technical Barriers to Trade (*i.e.*, TBT Agreement), which mandates, in relevant part, that technical regulations not be more trade-restrictive than necessary to fulfil a legitimate objective.

Apart from observing its international obligations, the EU will also need to ensure that any measure does not run counter to its own domestic principles. The Proposal claims to pursue a high level of protection throughout the EU, while protecting individual EU Member States' views. However, it is undeniable that further (possibly, unwanted) effects may be created if restrictions (which may vary from one EU Member State to another) are put in place in national jurisdictions. In particular, the proposed measures could result in a fragmentation of the EU's internal market and create related obstacles (such as costs and logistical problems arising from the need to segregate imports). This may ultimately result in discouraging companies from submitting applications for GM food and feed in the EU, and negatively affect an important market that is highly dependent on international trade (concerning feed, the EU needs more than 36 million tonnes of equivalent soybean annually to feed its livestock, of which it only produces 1.4 million domestically).

The US Trade Representative has indicated that the Proposal "*seems at odds with the EU's goal of deepening the internal market*" and that it "*appears hard to reconcile with the EU's international obligations*". Although the Proposal is at an early stage of the legislative procedure, interested parties should promptly seek expert advice on the potential implications of the proposed framework and maintain regular communications with the relevant authorities. It remains to be seen whether the legislative process will accommodate the views of the EU's trading partners or whether those views will ultimately result in litigation, possibly before the WTO.

China requests WTO consultations with the EU due to the latter's measures affecting imports of certain poultry products

On 8 April 2015, China requested WTO consultations with the EU in relation to specific EU measures that, according to China, negatively affect its exports of certain poultry products to

the EU. In its request for consultations, China maintains that the EU's contentious measures are the result of two EU requests to modify its tariff concessions under Article XXVIII of the GATT in recent years.

In June 2006, the EU notified the WTO that it would modify its tariff concessions for three tariff lines (*i.e*., salted poultry meat, prepared turkey meat and cooked chicken meat). The EU's decision followed the conclusion of the WTO *EC – Chicken cuts* dispute. In that case, Brazil and Thailand challenged the 2002 EU's re-classification of "*boneless chicken cuts, frozen and impregnated with salt and having a salt content by weight of 1.2% to 1.9%*" (hereinafter, boneless chicken cuts), alleging that it subjected imports of such product to higher duties. In fact, the EU's re-classification (from heading 0210 to heading 0207 of the EU's Combined Nomenclature) involved a change in the applicable tariff rates to boneless chicken cuts (from an *ad valorem* tariff rate of 15.4% to a specific tariff of EUR 102.4 per 100 kg/net). In relevant part, the WTO panel and Appellate Body agreed with the complainants that boneless chicken cuts had to be classified under heading 0210 and found that the EU had contravened Article II:1 of the GATT, inasmuch as the re-classification resulted in tariffs higher than those provided for in the EU's Schedule.

To bring its measures in line with WTO law, the EU issued a regulation clarifying that boneless chicken cuts should be classified under heading 0210. Simultaneously, in order to preserve its commercial interests, the EU started negotiations to modify its bound duty rates with respect to salted poultry meat, prepared turkey meat and cooked chicken meat (*i.e.*, *inter alia*, heading 0210). Article XXVIII of the GATT allows WTO Members to modify their bound duty rates provided that (among other conditions) certain WTO Members be consulted. The rationale behind this requirement is that the trading partners that stand to be mostly affected by the tariff modification should be entitled to some sort of '*compensation*'. The negotiating process resulted in the EU modifying its bound tariffs for the three relevant products and, in return, opening tariff-rate quotas (hereinafter, TRQs), the largest shares of which were allocated to Brazil and Thailand. This scheme allowed Brazil and Thailand to export certain quantities of the relevant goods at an advantageous in-quota rate, while out-of-quota imports were subject to significantly higher tariffs. In addition, a residual share of the TRQs was left open to all other suppliers. In particular, for salted poultry meat, the EU allocated 64.7% of the TRQ to Brazil, 35% to Thailand and 0.3% to other countries.

China also refers to an EU notification to modify its tariffs submitted in June 2009. In the aftermath of the developments indicated above, the EU modified its tariff concessions for eight tariff lines (which concerned, broadly, processed chicken meat and processed duck, geese and guinea fowl meat). As in the previous case, the EU opened TRQs that it allocated mostly to Brazil and Thailand, and left a residual part to other exporters.

In its request for consultations, China appears to challenge both the fact that the EU did not recognise its negotiating rights (under Article XXVIII of the GATT) and that it was not allocated a sufficiently significant share within the relevant TRQs (according to Article XIII of the GATT). In relevant part, China claims that the EU breached Article XXVIII of the GATT, which requires that WTO Members with an '*initial negotiating right*', a '*principal supplying interest*' and a '*substantial interest*' be involved in the negotiations. The EU conducted the relevant negotiations with Brazil and Thailand because it considered that these two countries enjoyed a '*principal supplying interest*' and/or a '*substantial interest*' in the various products at hand. The *Ad* Article XXVIII Paragraph 1 of the GATT clarifies that a '*principal supplying interest*' should be recognised to only one (or, in exceptional cases, two) WTO Members. The same provision acknowledges that, although the expression '*substantial interest*' cannot be precisely defined, it is intended to cover trading partners which, in the absence of "*discriminatory quantitative restrictions affecting their exports, [would have] a significant share*" in the importing market. In this sense, China could be arguing that the restrictions in place in the EU during the relevant reference periods (*i.e.*, 2003-2005 and 2006-2008, mostly due to the

outbreak of avian influenza) may have unduly affected the "*significant share*" that Chinese poultry would have otherwise enjoyed in the EU.

In addition, China claims that the EU allocated the TRQs in contravention of Article XIII of the GATT. This provision requires that TRQs be allocated on a non-discriminatory fashion and that they reflect, as closely as possible, the market shares that suppliers would enjoy in the absence of any TRQ or market restriction. The allocation may be based on an agreement between WTO Members having a "*substantial interest*" in supplying the relevant product or (should this method not be practicable) on the basis of the proportion that they have supplied during a previous representative period (*i.e.*, past trading performance). China maintains that the EU did not observe these rules and, in particular, that the EU did not regard it as a country with a "*substantial interest*". Although there is no precise definition, in terms of volume of trade, of this concept, a 10% threshold of the market share (as developed under Article XXVIII of the GATT) was used in the context of the *EC – Bananas III* case. The panel in the same dispute noted that the allocation of country-specific shares to WTO Members having a "*substantial interest*", combined with a "*significant*" share for WTO Members without such status, is not inconsistent with WTO law. However, China argues that the share allotted to countries without a "*substantial interest*" was not "*significant*". As for the allotment on the basis of past trading performance, WTO Members enjoy some discretion when choosing the representative period of time on which to base the allocation, although the previous three years are normally considered appropriate.

According to Article 4 of the WTO *Dispute Settlement Understanding*, unless China and the EU settle their disagreement within 60 days, China will be entitled to request that a WTO panel be established. In the meantime, operators involved in the concerned sectors are advised to liaise with the relevant authorities, in order to ensure that their interests are taken into account in all the necessary *fora*. In addition, these consultations provide an opportunity to operators from trading partners similarly affected by the EU's measures (such as Argentina, Israel, Ukraine and the US) to explore their rights and consider their possibilities within the framework of an ongoing WTO dispute.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) 2015/651 of 24 April 2015 on the issue of licences for importing rice under the tariff quotas opened for the April 2015 subperiod by Implementing Regulation (EU) No. 1273/2011*

Customs Law

- *Commission Implementing Regulation (EU) 2015/678 of 29 April 2015 amending Implementing Regulation (EU) No. 543/2011 as regards the trigger levels for additional duties on tomatoes, cucumbers, table grapes, apricots, cherries, other than sour, peaches, including nectarines, and plums*

- *Commission Implementing Regulation (EU) 2015/630 of 22 April 2015 amending Implementing Regulation (EU) No. 498/2012 on the allocation of tariff-rate quotas applying to exports of wood from the Russian Federation to the European Union*

- *Commission Delegated Regulation (EU) 2015/675 of 26 February 2015 amending Council Regulation (EC) No. 673/2005 establishing additional customs duties on imports of certain products originating in the United States of America*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2015/608 of 14 April 2015 amending Regulation (EC) No. 798/2008 as regards the entries for Ukraine and Israel in the list of third countries, the approval of the control programme of Ukraine for Salmonella in laying hens, the veterinary certification requirements concerning Newcastle disease and processing requirements for egg products*

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