FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 1 of 13 January 2017

The US may soon reinstate retaliatory tariffs relating to a long-standing dispute on the EU's measures concerning meat and meat products

On 22 December 2016, the Office of the United States Trade Representative (hereinafter, USTR) announced that it has scheduled a public hearing and is seeking public comments relating to the EU's long-standing prohibition of meat produced with growth-inducing hormones.

The EU and the US have been disputing EU measures concerning meat and meat products since the 1980s. In 1981, the EU adopted restrictions on the use of hormones in livestock production. In advance of the implementation of the EU's restrictions in 1989, the US invoked dispute settlement procedures under the General Agreement on Tariffs and Trade (hereinafter, GATT) in 1986. The dispute resulted in retaliatory tariffs by the US against EU imports until 1996. Following the establishment of the WTO, the US continued to challenge the EU's measures. A series of WTO dispute settlement procedures and decisions took place from 1996 to 2009. Most recently, in October 2008, the WTO Appellate Body circulated a Report authorising continued trade sanctions by the US against the EU (stemming from a July 1999 decision, and amounting to USD 116.8 million per year), but reversed the underlying panel's findings that the EU prohibition violated its WTO obligations.

Since 1989, as modified in 2003, the EU has prohibited the production or importation of meat and meat products produced from animals to which *estradiol-17β*, *testosterone*, *progesterone*, *zeranol*, *trenbolone acetate* or *melengestrol acetate* have been administered. All six of said hormones are approved for use in the US and approximately two-thirds of US cattle is believed to be treated with growth hormones, but this number rises to approximately 90 percent of cattle on feedlots and almost 100 percent on commercial feedlots in the US. Cattle producers use hormones to produce larger livestock in less time, to decrease the amount of feed and other inputs needed, and to produce leaner carcasses, thereby increasing efficiency and reducing product costs. Other countries that approve the use of hormones in cattle production include, *inter alia*, Australia, Canada, Chile, Japan, Mexico, New Zealand and South Africa.

As a result of the WTO decision in 1999, the USTR announced a list of products that were subject to a 100 percent *ad valorem* rate of duty, a list that was later modified in January 2009. The modified list includes, *inter alia*, various meats, meat products and animal by-

products, Roquefort cheese, flowers and foliage, tomatoes, truffles, carrots, chestnuts, paprika, oats, chewing gum, sugar confectionary cough drops, chocolate, specific jams, satsumas (*i.e.*, a type of citrus fruit), pears, peaches, fruit juices, roasted chicory, mustard, soup broth, mineral water, animal feed, glue, rayon fibre, single yarn fibre, hair clippers and motorcycles. However, the implementation of the modified list was delayed while the EU and the US negotiated a settlement to the dispute, which was announced in May 2009.

The settlement consisted of a Memorandum of Understanding (hereinafter, MoU) whereby the EU would phase-in market access for specially-produced High Quality Beef (*i.e.*, growth-hormone-free beef, abbreviated as HQB) through a dedicated tariff-rate quota (hereinafter, TRQ). The US, in turn, agreed to phase-out the retaliatory tariff duties on EU products, which were fully eliminated in May 2011. Phase 1 of the MoU set the HQB TRQ at 20,000 metric tonnes (MT), while Phase 2 and Phase 3 of the MoU increased the HQB TRQ to 45,000 MT. The MoU between the EU and the US was adopted in parallel to a related MoU between Canada and the EU, offered by the EU as a solution to the corresponding WTO dispute brought by Canada on the same issues. The Canada-EU MoU increased the HQB TRQ by 1,500 MT in Phase 1, and by another 1,700 MT in Phase 2. As a result, the current HQB TRQ is 48,200 MT.

The most recent action by USTR is the direct result of a written request of 9 December 2016 by US beef industry representatives to reinstate retaliatory tariff measures against EU imports. In particular, the US beef industry believes that the MoU between the EU and the US no longer adequately benefits the US beef industry, in particular because of the increasing use of the HQB TRQ by a number of other countries (*e.g.*, Argentina, Australia, Canada, New Zealand and Uruguay), which were '*not intended*' to be the *de facto* beneficiaries of the scheme. More generally and in legal terms, the action appears to stem from a push by the US to increase the enforcement of the US Trade Act of 1974 using the Trade Facilitation and Trade Enforcement Act of 2015, passed by the US Congress and signed by US President Barack Obama in February 2016. It may also be a pre-emptive move by US industry and trade negotiators, which are growing frustrated at the inability of the EU and the US to progress in their Transatlantic Trade and Investment Partnership (hereinafter, TTIP) negotiations.

According to the United States Trade Representative, "*[t]he EU has failed to live up to its assurances on this issue*". A USTR press release added that the settlement "*has not worked as intended*". Reports indicate that the US beef industry contends that, although the HQB TRQ remains in place, the deal has not sufficiently compensated the economic harm resulting in the ban on traditional US beef and beef products. In particular, this is due to portions of the HQB TRQ being increasingly allocated over time by the EU to non-US exporters, due to the application of the Most Favoured Nation (hereinafter, MFN) obligation of the WTO framework (*i.e.*, the principle that trade benefits provided outside of formal free trade agreements (hereinafter, FTAs) cannot discriminate against other WTO Members and must be provided to all WTO Members).

However, we know that the MoUs were intended to provide '*compensatory concessions*' only to the US and Canada. The '*technical trick*' used by the EU had been to open TRQs on the basis of a definition of HQB that would be '*de jure*' available to all (*i.e.*, MFN compliant on its face), but '*de facto*' available only to the US and Canada (*i.e.*, discriminatory in favour of the two countries that the EU had to '*compensate*' as a consequence of WTO litigation). In fact, when the original MoUs were agreed, the type of beef falling within the scope of the HQB TRQ was only (or primarily) produced in Canada and the US. Specifically, "*beef cuts obtained from carcasses of heifers and steers less than 30 months of age which have only been fed a diet, for at least 100 days before slaughter, containing not less than 62% of concentrates and/or feed grain co-products on a dietary dry matter basis*" (accordingly, the relevant TRQ is sometimes referred to as the high-quality grain-fed beef quota).

This technical '*trick*' was rather astute and worked well for a while. No third country challenged the scheme at the WTO as '*de facto*' discriminatory and the gamble by the EU,

Canada and the US was that their bilateral FTAs (*i.e.*, the Comprehensive Economic and Trade Agreement, hereinafter CETA, and the TTIP, respectively) would come to fruition soon enough to allow the '*re-packaging*' of the '*compensatory concessions'* under those preferential instruments before other WTO Members could challenge them or start benefitting from them, thereby eroding the Canadian and US preferences. However, over time, beef producers in non-North American countries modified their operations to take advantage of this duty-free access to the EU market. Over the last two years, the HQB TRQ (which is administered on a '*first come, first serve*' basis) has been filled with increasing shipments of HQB from Argentina and Australia, with the US' shares of the quota continuing to decline. Reportedly, the US has unsuccessfully attempted to negotiate an increase to the TRQ with the EU. Said negotiations appear to have taken place within the context of the TTIP negotiations. However, after an announcement in September 2016 by EU officials, that it would not be possible to conclude TTIP negotiations in 2016, and likely given the anticipated disinterest of US President-Elect Donald Trump to conclude TTIP negotiations, it appears that the US beef industry decided that more aggressive action was required.

This is even more understandable given the recent conclusion of the CETA between Canada and the EU, which includes a TRQ on '*fresh or chilled beef and veal*' that increases from 5,140 to 30,840 MT over six years and that reportedly absorbs Canada's portion of the HQB TRQ. Ideally, the conclusion of the CETA and the TTIP would have allowed for the termination of the HQB TRQ, and thus the competition faced by Canada and the US from, *inter alia*, Argentina and Australia. Unfortunately, in light of the '*de facto'* suspension and bleak future prospects of TTIP negotiations, this increased market access to the EU market for US beef producers appears to be unlikely and the HQB TRQ open to many other (often more competitive) WTO Members. The request for the reinstatement of retaliatory tariffs on EU exports to the US may thus be a negotiating tactic to increase the US' leverage for renegotiation of the HQB TRQ allotment or for the definition of another scheme that would deliver the kind of '*compensatory concessions*' that the US expects (and deserves as a consequence of the WTO ruling).

Alternatively, the US may simply be of the belief that updated scientific evidence could result in a more favourable decision under WTO dispute settlement procedures. The issue, when simplified, comes down to WTO Members' obligation to ensure, under Article 5 of the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement), that SPS measures are based on risk assessments. The US easily '*won*' the original WTO dispute because the EU had failed to conduct a risk assessment and then to provide conclusive evidence that hormones were unsafe. The EU conducted studies and provided more scientific evidence in the later WTO dispute on the matter, but a WTO panel still found that the prohibition of hormone-treated meat violated its WTO obligations. The WTO Appellate Body reversed the findings of the panel against the EU, but was unable to complete the legal analysis. Reports indicate that the EU believes that there is even more science to support its position now, while the US maintains that the science is in its favour. Round 3 (or 4, depending on how and from when you count) of this dispute, if pursued, would likely focus on the scientific evidence and would have important trade and commercial consequences.

The public hearing will be convened by the Section 301 Committee (a reference to Section 301 of the US Trade Act of 1974 on the elimination of practices that impede US exports), an interagency committee composed of trade experts and economists. The hearing will take place on Wednesday, 15 February 2017, but the deadline for interested persons to submit written comments and requests to appear at the hearing is Monday, 30 January 2017. The notice published by the USTR in the US Federal Register clarifies that public comments should pertain to the modification of the list of products that would be subject to retaliatory tariff duties. The language used implies that action will be taken in the near future, and that the USTR is simply interested in modifying the list of goods subject to retaliation. That is to say, regardless of the results of the public hearing and comments received, the question of whether the US will reinstate retaliatory tariffs against the EU is less '*if*' and more '*when*' (and '*how'*). The '*tailor-made*' solution to the original dispute between the EU and the US is no

longer compensating the US beef industry as it was intended to do, and the US feels that it is now the time to act. Interested parties should closely monitor developments, and consider submitting public comments and/or a request to take part in the hearing. Potential targets of the new retaliatory measures should also act swiftly to ensure that their sectors and/or products are not targeted or to minimise the impact on their operations.

The CJEU's Advocate General determines that the EU-Singapore Free Trade Agreement has to be concluded jointly by the EU and the EU Member States

On 21 December 2016, the Advocate General (hereinafter, AG) Eleanor Sharpston of the Court of Justice of the European Union (hereinafter, CJEU or Court) delivered her opinion in the case of an advisory opinion on the competences of the EU and the EU Member States regarding the free trade agreement between the European Union and Singapore (hereinafter, EUSFTA), requested by the European Commission (hereinafter, Commission). She determined that the EUSFTA can only be concluded by the EU and the EU Member States acting jointly. As the eventual CJEU's pronouncements tend to largely reflect the conclusions expressed in the opinions of AGs, the interpretations may have a profound impact on the future of the EU's external trade policy.

The EU originally envisaged to conclude a free trade agreement with the entire Association of Southeast Asian Nations (hereinafter, ASEAN), of which Singapore is a member. As implementation of this idea proved difficult, primarily for political reasons, the European Commission (hereinafter, Commission) proposed negotiating bilateral free trade agreements with individual ASEAN countries, starting with Singapore. After the final text of the agreement was initialled by the EU and Singapore in June 2015, a disagreement arose between the Commission and delegations from EU Member States over whether the EUSFTA deals with areas that do not fall within the competence of the EU and should therefore be signed and concluded as a '*mixed*' agreement (on the notion of '*mixed*' agreements, see *Trade Perspectives*, Issue No. 13 of 1 July 2016). In accordance with Article 218(11) of the Treaty on the Functioning of the European Union (hereinafter, TFEU), the Commission referred the matter to the CJEU for an advisory opinion. The Commission's request consists of two parts. Firstly, the Commission asked whether the EU is competent to sign and conclude the EUSFTA alone. Secondly, it asked which provisions of the EUSFTA fall within the exclusive competence of the EU, which are shared competences between the EU and EU Member States, and which are exclusive competences of EU Member States.

The division of competences relates to the key constitutional issue of the division of power between the EU and its constituent Member States. Article 5 of the Treaty on European Union (hereinafter, TEU) lays down the important principle of conferral: the EU may act only within the limits of the competences conferred upon it by the EU Member States in the TEU and TFEU (hereinafter, Treaties) to attain the objectives set out therein, while competences not conferred upon the EU in the Treaties remain with the EU Member States. Article 2 of the TFEU identifies two categories of EU competence: exclusive and shared. When the TFEU confers exclusive competence to the EU in a certain area, only the EU may legislate and adopt legally binding acts in that area. In the case of shared competence, both the EU and EU Member States may act. The EU has the power to conclude an international agreement (*i.e.*, possesses external competence, either exclusive or shared with the Member States) in the circumstances outlined in Article 216(1) of the TFEU.

While there is no uncertainty as to the fact that the EU does not need to involve the Member States in the conclusion of agreements falling entirely within its exclusive competence, a remarkable point of the AG's opinion concerns the allocation of roles in the conclusion of '*mixed*' agreements. Article 2(2) of the TFEU grants the EU the '*right of pre-emption*': it specifies that, where competence is shared, EU Member States may exercise it only to the extent that the EU has not exercised its competence, which would imply that the EU does not necessarily have to seek agreement of the national legislatures of EU Member States for

those areas in the EUSFTA that fall within shared competence. However, according to the AG, the EU's right of pre-emption in relation to areas falling within its *external* competence is constrained by Article 218 of the TFEU, which requires a separate decision of the Council of the EU (hereinafter, Council) to authorise each step of the process leading to the conclusion of an international agreement. Therefore, the AG concluded that, in the case of a '*mixed*' agreement, the Council (*i.e.*, the Member States) may decide (ordinarily, by qualified majority) that it is the EU Member States that should be allowed to exercise competence over all or some of the areas of shared competence and, therefore, the Council may withhold its authorisation to proceed to the signing or conclusion of the agreement unless and until the EU Member States have given their consent (after completing their respective national procedures). In the case of an agreement that entirely falls within the exclusive competence of the EU, the Council is unable to subject its authorisation to such a condition.

Article 3(1) of the TFEU explicitly confers exclusive competence to the EU in five specific fields, in particular within the area of the common commercial policy (Article 3(1)(e) of the TFEU). Whether a specific area of the EUSFTA forms part of the common commercial policy is one of the central issues of the AG's analysis. The scope of the EU's common commercial policy, and the way it is understood in EU law, has expanded over time. Article 207(1) of the TFEU lists a number of specific areas that form part of the common commercial policy and grants the EU competence to conclude international agreements in those areas. Pursuant to the CJEU's case law, the common commercial policy may also cover non-trade areas that have "*direct and immediate effects on trade"*. Article 207(5) of the TFEU carves out '*international agreements in the field of transport*' from the scope of the common commercial policy.

Article 3(2) of the TFEU establishes three additional grounds on which the EU may claim exclusive competence for the conclusion of an international agreement. In relevant part, such exclusive competence exists where the conclusion of an agreement may "*affect common rules or alter their scope*". This provision codifies the CJEU's earlier case law, which recognised the *implied* exclusive EU competence in areas where common rules exist, as independent action by EU Member States in those areas would jeopardise the EU integration process. The AG defines '*common rules*' as rules of secondary law to pursue a common policy. Thus, for example, though Article 207(5) of the TFEU excludes transport from the scope of the common commercial policy, the provisions in the EUSFTA governing rail transport services nevertheless fall within the EU's exclusive external competence because *Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area* sets out common EU rules in the area of rail transport.

On the basis of her analysis, the AG concluded that the EU has exclusive competence concerning Chapters 1, 2-6, 7, 12 and a significant part of the provisions of Chapters 8-11 and 13 of the EUSFTA. Where the EU does not enjoy exclusive competence in a specific area, it may still have shared competence under Article 4(2) of the TFEU. If one of the conditions laid out in Article 216(1) of the TFEU, for the existence of the EU's competence to conclude international agreements, is satisfied, the EU has shared *external* competence in the respective area. The AG determined that the EU shares competence with EU Member States over certain parts of Chapters 8-11 and 13.

Finally, the AG concluded that the allocation of competences over provisions in the EUSFTA, which are purely '*accessory*' to more substantive provisions, follows the division of competences over such substantive provisions. This has implications for what is currently one of the most contentious issues in the EU's trade and investment treaties, namely the settlement of investment disputes. In particular, the AG concluded that, since the EU, pursuant to Article 207(1) of the TFEU, has exclusive competence over foreign direct investments (FDIs), it also has accessory exclusive competence over the ISDS mechanisms in the EUSFTA, as they apply to FDIs. Additionally, Chapter 14 on transparency, administrative and judicial review, the provisions in Chapters 13, 15, 16 on dispute settlement and mediation, and Chapter 17 (laying down a number of institutional, general

and final provisions) are all deemed by the AG either accessory, merely incidental or limited in scope and, therefore, follow the allocation of competences over the respective substantive obligations or cannot change such allocation.

Areas in which the EU has no exclusive or shared competence remain within the exclusive competence of the EU Member States. The AG determined that only Article 9.10.1, which provides for the automatic termination of Bilateral Investment Treaties (hereinafter, BITs) of EU Member States with Singapore upon the EUSFTA's entry into force, falls within the exclusive competence of the respective EU Member States because the EU does not automatically succeed to the international agreements concluded by EU Member States to which it is not a party.

If the CJEU, as it may be expected, were to follow the approach and the conclusions of the AG, the EU Member States would have to sign and conclude the EUSFTA in their own name, together with the EU. This would have important legal consequences stemming from the fact that all EU Member States will have to become party to the agreement. In particular, EU Member States will be liable for and enjoy the right of action in respect of breaches of those provisions that they subscribed to in exercising their competence. They will also have the right to terminate the EUSFTA, but will remain bound, by virtue of Article 216(2) of the TFEU, by all the provisions that fall within the exclusive competence of the EU. The AG thus suggests that, for the sake of clarity, a declaration be appended to the EUSFTA and similar agreements, stating clearly who (*i.e.*, the EU Member States or the EU), has exercised competence in respect of each specific aspect of the agreement.

The conclusion of *'mixed'* agreements covering a wide range of economic and non-economic areas may, as the AG admits, be cumbersome and complex, in particular because it requires ratification by national and sometimes even regional parliaments of all the EU Member States. Splitting such treaties along the lines of competence could take away from their ambition, but may be justified if the benefits of a more expedited and legally certain conclusion outweigh the drawbacks of a more limited scope – or if this is the only way to overcome a standoff over rules in areas of shared competence. For *'mixed'* agreements, certain changes in the EU's treaty negotiation process may be required, including closer and earlier involvement of a broader range of parties and stakeholders, as well as sincere and close cooperation between the institutions of the EU and the Member States. This includes respecting each other's competences, so that, while the Commission has to pay more deference to the EU Member States' positions in areas of their competence, the EU Member States, as the AG underlined, are unable to refuse to conclude a treaty on grounds of disagreement with its provisions falling within the EU's exclusive competence. The advisory opinion of the CJEU looks poised to be issued within the next few months. Meanwhile, now it is the time for all relevant stakeholders to get involved in preparation of the likely reshaping of EU trade policy.

France starts a two-year trial of mandatory COOL – Should the EU take a harmonised approach on COOL?

On 1 January 2017, France started a two-year trial of a mandatory country of origin labelling (hereinafter, COOL) scheme, which requires producers of milk, food containing milk products and food containing meat to provide information on the country of origin of the products. The scheme was introduced through Decree No. 2016-1137 (*i.e.*, *Décret n° 2016-1137 du 19 août 2016 relatif à l'indication de l'origine du lait et du lait et des viandes utilisés en tant qu'ingrédient*, hereinafter, the Decree). Before the end of this trial period, France has promised to provide a report to the European Commission (hereinafter, Commission) that would allow it to review consumer patterns and the potential impact on the internal market. In view of the report, the Commission may consider implementing such a scheme in all EU Member States.

According to Article 2 of the Decree, the indication of the origin of meat must include, for each category of meat, the following information: 1) country of birth; 2) country of fattening; and 3) country of slaughter. When a category of meat comes from animals born, raised and slaughtered in the same country, the indication of origin may be given as '*Origin: (name of country)*'. Similarly, Article 3 of the Decree provides that the indication of the origin of milk or milk used as an ingredient in dairy products must include the following information: 1) '*country of collection: (name of country)*'; and 2) '*country of transformation: (name of country where it has been conditioned and transformed)*'. When milk or milk used as an ingredient in dairy products has been collected and processed in the same country, the indication of origin may appear as '*origin: (name of country)*'. When the steps referred to in Articles 2 and 3 of the Decree are carried-out on the territory of several EU Member States, the mention '*EU*' may be used, instead of the name of the country or countries to designate the location of the steps involved. In addition, when those steps are carried-out on the territory of several countries located outside the EU, the words '*Outside EU*' can be used instead of the name of the country or countries to designate the location of the relevant steps.

According to Article 6 of the Decree, products lawfully produced or marketed in another EU Member State are not subject to the provisions of the Decree. The implementing decree of 28 September 2016 (*Arrêté du 28 septembre 2016 fixant les seuils prévus par le décret n° 2016-1137 du 19 août 2016 relatif à l'indication de l'origine du lait et du lait et des viandes utilisés en tant qu'ingrédient*) establishes the thresholds required for the application of the Decree at 50%, for milk used as an ingredient in a dairy product, and at 8%, for meat used as an ingredient in a processed product. Therefore, France's COOL scheme requires that, *inter alia*, ready meals with a meat content of more than 8% specify where livestock was born, reared and slaughtered.

There are already a number of food products that are subject to mandatory COOL in the EU, including honey, fruits and vegetables, fish and olive oil. Concerning meat, COOL was made mandatory for unprocessed fresh beef and beef products in the aftermath of the mad cow disease epidemic (*i.e.*, Bovine spongiform encephalopathy, or BSE). In addition, the EU's *Food Information Regulation No. 1169/2011* (hereinafter, FIR) requires that unprocessed fresh, chilled or frozen meat of swine, poultry, sheep and goats be accompanied by COOL (see *Trade Perspectives*, Issue No. 23 of 13 December 2013). Likewise, the FIR requires that COOL be mandatory in instances where a failure to provide such information could mislead consumers. The scope of mandatory COOL in the EU stands to be further expanded by specific provisions in the FIR that enable the Commission to table legislative proposals on mandatory COOL for, *inter alia*, other types of meat, milk, unprocessed foods and meat used as an ingredient in processed foods.

After being notified by France of the draft Decree No. 2016-1137, on 12 April 2016, the Commission consulted the Standing Committee on Plants, Animals, Food and Feed (composed of representatives from the Commission and the EU Member States, and, hereinafter, SCPAFF) on the matter. During the relevant meeting of the SCPAFF, a number of Member States raised concerns about the negative impact of the French measure on the access of non-French ingredient suppliers, particularly on small- and medium-sized enterprises, to food production and distribution in France. Other delegations did not oppose mandatory COOL as such, but expressed a preference for a harmonised approach at EU level, while a few delegations supported the French draft. The Commission reminded the SCPAFF that the FIR allows EU Member States to adopt national measures on COOL on food under certain conditions. It also stated that "*the topic was intensively debated at the co-decision stage and that the political and legal context has significantly evolved in recent years*".

Other EU Member States are already moving to adopt similar COOL legislation. In the last few months, the SCPAFF has held exchanges of views on Italian, Lithuanian, Portuguese, and Greek draft measures prescribing the indication of the origin of milk, dairy products and, in one case, rabbit meat. Such national measures show a piecemeal approach within the EU's internal market. COOL appears to be a national priority in some EU Member States,

possibly implying that what is produced in those EU Member States is of better quality and safer than products from abroad. It sometimes appears that such measures are proposed for rather simplistic and protectionist reasons. It is for these countries to recall that COOL was imposed (for food safety and traceability reasons) for beef in the aftermath of the BSE scandal. At that time, there was a food safety matter with, in particular, British beef. COOL helped all EU beef to regain consumer confidence. Milk, meat and meat products are all subject to the same harmonised EU hygiene and safety standards. For specific quality products, *inter alia*, harmonised geographical indications requirements are in place at EU level.

Already on 21 January 2015, Members of the EU Parliament's Committee on the Environment, Public Health and Food Safety (hereinafter, MEPs) tabled a motion for a resolution urging the Commission to put forward a legislative proposal incorporating mandatory COOL for meat used as an ingredient in processed foods. The MEPs' document followed a report that the Commission submitted to the European Parliament and the Council of the EU in December 2013, which elaborated on the consequences of making COOL compulsory for this sort of meat. The Commission's report concluded, in relevant part, that there was a need for EU institutions to further discuss the relevant issues and, on that basis, that the Commission would consider the appropriateness of tabling a legislative proposal (see *Trade Perspectives*, Issue No. 3 of 6 February 2015).

European trade associations also appear to prefer a harmonised approach on COOL for milk and meat as an ingredient. The European Dairy Association (hereinafter, EDA) has expressed serious concerns to the Commission regarding the French initiative on mandatory origin labelling, which, in its view, reintroduces national barriers among EU Member States and hinders harmonised implementation of the FIR. The Commissioner responsible for health and food safety informed the EDA that the Commission had not raised any objection to the French measure and that the potential effects on the internal market, including its impact on imported foods from other EU Member States, would be evaluated in the context of the French authorities' report due in 2018. The EDA then turned to the EU Ombudsman, who launched an inquiry into the matter and found that the Commission's implicit approval of the French measure complied, from a procedural point of view, with the relevant legal requirements, in particular Article 45(3) of the FIR, since the Commission had consulted the SCPAFF on the Decree. Following that meeting, the Commission informed the complainant that it would not issue a negative opinion on the Decree. As regards the substance of the Commission's decision, the Ombudsman found in its Decision in case 1212/2016/PMC of 12 September 2016 that, at this stage, the EDA had not demonstrated maladministration on the part of the Commission. The Ombudsman reassured the EDA that, should it raise such concerns with the Commission, and should it consider the Commission's response to be inadequate, it could complain to the Ombudsman again.

The European Meat and Livestock Trading Union (UECBV) reportedly argues that France's two-year COOL scheme trial could contribute to a "*fragmentation of the single market*". FoodDrinkEurope (FDE), representing the European food and drink industry, has reportedly challenged France's COOL scheme for meat in ready meals and milk in prepared foodstuffs, claiming that it would lead to higher packaging and production costs, entail enforcement costs, and increase an administrative burden on businesses. FDE is reportedly arguing that the measure is aimed at encouraging local sourcing without regard to the detrimental impact that it may have on established supply chains, which transcend national, and sometimes even European, borders. It is not clear whether Article 6 of the Decree, which states that products lawfully produced or marketed in another EU Member State are not subject to the provisions of the Decree, may accommodate these concerns. A French producer using German meat as an ingredient must indicate so. Only Germany-based producers, which are active on the French market, even if they use, *inter alia*, French meat, would be exempted from the additional COOL.

So far, the Commission does not appear to be inclined to introduce harmonised legislation for mandatory COOL for milk and meat used as an ingredient, and appears to prefer

voluntary COOL. Another matter is that the Decree will inevitably lead to labels similar to the notorious COOL '*blend of EU and non-EU honeys*' on honey (see *Trade Perspectives*, Issue No. 14 of 15 July 2016). It cannot be excluded that manufacturers in France will have to use similar wordings for their meat and milk ingredients. Current voluntary labels of a French retailer in Belgium provide for alternatives and state, *inter alia*, '*produced in Belgium with poultry of Belgium, Germany or the Netherlands, rice of Pakistan and spices of Thailand*'. Such '*alternative*' labels could guarantee a certain degree of '*sourcing and supply-chain flexibility*' for producers without misinforming consumers.

The introduction of COOL requirements has consistently proved to be a controversial matter, as shown by the FIR's negotiating history, which evidences severe disparities of opinion at the very heart of EU institutions, EU Member States and relevant stakeholders. Should the Commission embrace the concerns of the ENVI Committee's MEPs and develop a draft instrument making COOL for meat used as an ingredient mandatory, it would have to take into account the EU's international trade obligations. In this respect, there are a number of lessons learnt from the US experience on mandatory COOL for certain agricultural commodities, which gave rise to a landmark WTO dispute triggered in 2008 (see *Trade Perspectives*, Issue No. 3 of 6 February 2015). On 18 May 2015, the WTO Appellate Body issued its Report in *United States – Certain Country of Origin Labelling (COOL) Requirements* regarding compliance with previous recommendations made by the WTO Dispute Settlement Body (hereinafter, DSB) in relation to US COOL measures for meat. For the most part, the Appellate Body upheld the previous findings and conclusions of the compliance panel, that neither the original nor the amended US COOL measure was found to meet the applicable WTO requirements. The dispute appears to have finally reached the stage where (see *Trade Perspectives,* Issue No. 11 of 29 May 2015), Mexico and Canada were authorised by the WTO DSB to implement retaliatory measures (*i.e.*, to suspend concessions for a significant amount) against the US, prompting the US to amend its domestic legislation in order to comply with the recommendations of the WTO DSB.

The increased (regulatory) activity in EU Member States and the EU on COOL (in particular the reports of France after its trial, but also of other EU Member States and eventual legislative proposals put forward by the Commission) should be monitored and stakeholders should be prepared to participate in shaping potentially harmonised EU legislation by interacting with relevant EU institutions, trade associations and affected stakeholders. These schemes would have to be EU and WTO consistent so as to avoid potentially costly and destabilizing litigation and legal uncertainty for economic operators.

Recently Adopted EU Legislation

Market Access

- *Decision No 1/2016 of the Joint Committee on Agriculture of 16 November 2016 on amending Annex 10 to the Agreement between the European Community and the Swiss Confederation on trade in agricultural products [2017/51]*

Customs Law

- *Commission Implementing Regulation (EU) 2017/49 of 11 January 2017 laying down the allocation coefficient to be applied to the quantities covered by the applications for import licences lodged from 1 January 2017 to 6 January 2017 under the tariff quotas opened by Implementing Regulation (EU) 2015/2081 for certain cereals originating in Ukraine*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2017/12 of 6 January 2017 regarding the form and content of the applications and requests for the establishment of maximum residue limits in accordance with Regulation (EC) No 470/2009 of the European Parliament and of the Council*

- *Commission Implementing Decision (EU) 2017/14 of 5 January 2017 amending the Annex to Implementing Decision (EU) 2016/2122 on protective measures in relation to outbreaks of the highly pathogenic avian influenza of subtype H5N8 in certain Member States (notified under document C(2017) 55)*

Other

- *Notice concerning the entry into force of the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part*

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