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The future of Trade and Sustainable Development Chapters in the EU's Free Trade Agreements – A Commission '*non-paper*' fuels the debate

On 11 July 2017, the European Commission (hereinafter, Commission) published a '*non-paper*' on the "*Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)*", which is intended to stimulate a discussion on the topic with the European Parliament and the Council of the European Union (EU). A broader debate on this rather new aspect of trade agreements is slowly gaining traction. After the first trade agreements concluded by the EU and containing such chapters have been in force for a number of years, an evaluation of their impact and a discussion on the way forward is poised to take place in the autumn of this year. The key issues concern compliance and enforcement, as well as the question of how, if at all, the sustainability provisions should be linked to trade.

Since the 1990s, the FTAs negotiated by the United States (US) typically contain a "*Chapter on Trade and Labor"*, later on joined by a "*Chapter on Trade and Environment*". With the new generation of trade agreements, the EU also introduced a new approach with respect to trade and sustainability. The Economic Partnership Agreement (EPA) between the EU and the CARIFORUM country group, signed in 2008, was the first EU's FTA to include such provisions. Since the EU-Korea FTA, signed in 2010, all FTAs concluded by the EU include a '*Chapter on Trade and Sustainable Development*' or provisions to that effect. Such chapters generally focus on two key areas: labour and the environment. More specifically, the current TSD Chapters call for the effective implementation of fundamental labour conventions and multilateral environmental agreements (MEAs) and for the sustainable management of natural resources, in particular in the areas of forestry and fisheries, and biodiversity. The starting point is always that the potential negative sustainability implications of the FTAs should be minimised, while the possible sustainability benefits accruing from the agreement should be maximised, in particular through enhanced cooperation and dialogue. An important aspect is the involvement of civil society in the *fora* established by the TSD Chapters.

A study on TSD Chapters and provisions by the Swedish National Board of Trade notes that available research suggests that the dialogue and consultation mechanisms in the EU trade agreements yielded positive results and contributed to the improvement of labour standards in partner countries. However, despite such positive indications, problems appear to persist. In the European Parliament's Resolution of 18 May 2017 on the implementation of the EU-Korea FTA, the European Parliament notes that the progress made by Korea on the objectives enshrined in the TSD Chapter of the EU-Korea FTA was not satisfactory and that there were still cases of violation of freedom of association, including the imprisonment of trade union leaders and interference in labour negotiations.

Nearly ten years after such provisions and chapters first appeared in the EU's trade agreements, a discussion has commenced within the EU Institutions and EU Member States with respect to such chapters, their functioning and their effectiveness. On 10 May 2017, the Commission published the '*Reflection Paper on Harnessing Globalisation*', which notes that the "*EU should continue to develop a balanced, rules-based and progressive trade and investment agenda that not only opens markets in a reciprocal way but also enhances global governance on issues like human rights, working conditions, food safety, public health, environmental protection and animal welfare*". The Commission's Paper goes on to emphasise that the EU should aim at "*better enforcement of existing agreements and rules in such areas as trade, labour standards, climate and environment protection*", including the enforcement of the related commitments by the EU's trading partners in their trade and investment agreements. The EU has now taken up this issue in its '*non-paper*' on the '*Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)*'.

The '*non-paper*' provides an overview of the current EU's approach on TSD and then goes on to present two options for discussion, further developing and refining said approach. The first option is entitled "*a more assertive partnership on TSD*" and essentially builds on the current approach. It would entail closer internal cooperation, among EU Member States and EU Institutions, and externally vis-à-vis the EU's trading partners. Furthermore, this option also provides for a "*more assertive use of the TSD dispute settlement mechanism*". The Commission notes that, continuing the approach based on partnership and cooperation, would be favoured by "*The New European Consensus on Development"*, which was adopted on 7 June 2017.

The second option is entitled "*a model with sanctions*", thereby already noting the main difference between the two options. This option takes up an approach currently used by the US and Canada in their respective FTAs, adding the possibility to apply sanctions at the end of dispute settlement proceedings in case of non-compliance and impacting trade or investment between the parties. In the case of the US, sanctions mean the withdrawal of trade concessions, while the FTAs concluded by Canada provide for monetary fines. Importantly, sanctions require a link to trade, namely a "*quantifiable harmful impact on bilateral trade or investment as a result of the FTA violation*" and the resulting withdrawal of concessions or fines would reflect this quantified impact.

While the first option is presented in an almost neutral and slightly positive manner, the presentation of the second option already provides an assessment by the Commission, showing the Commission's concerns with respect to option two. More specifically, while acknowledging that the introduction of sanctions could encourage partners to comply more fully with the TSD provisions, the Commission notes that until now, complaints about TSD implementation concerned violations that were indeed relevant in a trade context, but did not have a measurable direct, quantifiable impact. Furthermore, the Commission notes its concerns that such a more confrontational approach may jeopardise the relations with the relevant trading partner and thereby put the effectiveness of the TSD Chapter at risk.

It appears possible that the second option may have been added to the '*non-paper*' because the European Parliament is calling for the introduction of sanctions in TSD Chapters. In a '*Draft Report on a European Parliament recommendation to the Council, the Commission and the European External Action Service on the negotiations of the modernisation of the trade pillar of the EU -Chile Association Agreement*' tabled on 13 June 2017 by the European Parliament's INTA Committee, the Committee recommends "*to ensure that the modernised AA contains a robust and ambitious TSDC that includes binding and enforceable provisions, subject to dispute settlement mechanisms, with the possibility of imposing sanctions in case of breach*". Additionally, the Chairman of the European Parliament's Committee on International Trade tabled, on 29 June 2017, a '*Model Labour Chapter for EU Trade Agreements*', which had been developed by German trade scholars and which proposes "*to complement the traditional EU cooperative and promotional approach with sanctions-based dispute settlement procedures*". As a further innovation, the model chapter provides for a collective complaint procedure, which would allow workers', employers' or other civil society's associations to initiate proceedings against a Party with a view to enforce the agreed labour standards.

A difficult issue is indeed the idea of sanctions or, more generally speaking, the consequences of non-compliance and violations of the TSD Chapter provisions. This difficulty mostly originates in the cooperative approach of the existing TSD Chapters in EU FTAs, focusing on reiterating the existing commitments related to labour standards and environmental protection, and establishing *fora* to cooperate on these matters. Two questions must be distinguished and, while closely related, appear to be intermixed in the EU's '*non-paper*'. The first question relates to the fundamental question of whether non-compliance with a provision of the TSD Chapter should lead to certain (trade-related) consequences, or even sanctions. The second question concerns the requirements for such consequences and the linking of the sanctions to a quantifiable impact on bilateral trade or investment. Considering the cooperative nature of the commitments in the TSD Chapters, the study by the Swedish National Board of Trade appears to favour the strengthening of the cooperative approach and, most importantly, recommends shifting the focus from non-compliance towards a system of encouragement and rewards (*i.e.*, '*carrots, rather than sticks*'). This would avoid direct consequences and sanctions. However, the TSD Chapters and the relevant provisions cannot be seen and evaluated while completely disregarding their context within the trade agreements within which they are negotiated and applied.

To completely sever the link between trade and the sustainable development provisions cannot be in the interest of the EU and even less so in the interest of its trading partners, which often incur big efforts and high costs to ensure compliance with EU sustainability schemes and standards. Arguably, FTA parties should be rewarded, for their efforts with respect to sustainability, with commercial advantages offered through preferential trading conditions and market access. A commercialisation of the respective sustainability commitments is important in order to make such efforts and commitments worthwhile. It is also a question of fairness with respect to the actions of competing countries, which might not always achieve the same level of sustainability (or no sustainability at all), but might still be accessing the EU market under similar or even better conditions, due to other preferential market access schemes (*e.g.*, the Generalised System of Preferences (GSP) or the GSP+ schemes and/or the Everything but Arms (EBA) scheme).

Therefore, the EU and its trading partners should seize the opportunity provided by their bilateral or plurilateral negotiations and agreements in order to accord preferential market access to products defined as sustainable under the respective agreements, providing a clear comparative advantage vis-à-vis unsustainable products and, thereby, providing a clear

incentive to become more sustainable and to produce more sustainably. Sustainability must not be unilaterally defined. Rather, the bilateral or plurilateral negotiations provide the ideal *fora* to jointly define what is sustainable and to accord preferential market access to those products that meet the requirements and can be certified as such. Should the sustainability criteria be violated, the obvious sanction would be a partial or full removal of the relevant preferences.

At the end, the non-paper asks four questions: 1) Are the EU's TSD Chapters meeting expectations? If not, what are the shortcomings to be addressed and what could be done to improve them?; 2) Should the EU pursue a more assertive partnership on TSD in bilateral FTAs as described in option 1?; 3) Do you think that a sanction based approach, as described in option 2, would address the shortcomings identified?; and 4) Are there any other issues related to TSD to be addressed? While addressed at the European Parliament and the Council of the EU, the debate will probably become much broader, with industry associations and civil society organisations likely to weigh in as well. It appears likely that industry associations will argue for linking the TSD Chapter to trade, while trade unions and NGOs might favour TSD Chapters without such a link, enabling broader action without an impact on trade as a precondition.

A number of important FTA negotiations (*e.g.*, negotiations with Japan, MERCOSUR, Indonesia and Malaysia) or negotiations to update existing FTAs (*e.g.*, negotiations with Mexico and Chile) are currently ongoing and any change in the EU's approach would have to be contemplated in those negotiations. The debate can be expected to heat up in the autumn and all interested stakeholders, including EU trading partners, businesses, trade associations, and civil society organisations should be prepared and contribute to this discussion.

Time to split? How the EU should approach trade and investment in future agreements

Reports indicate that, on 11 July 2017, Peter Berz, Head of Unit in the Directorate General of the European Commission (hereinafter, Commission) responsible for trade relations with the Far East (*i.e.*, South and Southeast Asia, Australia and New Zealand), announced that the Commission had postponed the submission of its draft '*negotiating directives*' pertaining to the negotiation of trade agreements with Australia and New Zealand, respectively. The delay comes amidst a recent ruling by the Court of Justice of the European Union (hereinafter, CJEU) that clarified the competence of the EU and its Member States with respect to trade agreements, particularly as it applies to non-direct foreign investment and investment dispute settlement. The delay may signal a major shift in the EU's approach on how trade agreements are structured and negotiated.

In the EU, trade negotiations are managed by the Commission, in coordination with the European Parliament and the Council of the EU. When considering whether to pursue a trade agreement with a third country, the Commission will launch a public consultation and civil society dialogue on such potential agreement, followed by an impact assessment on the potential deal. The Commission also typically completes a '*scoping exercise*' with the third country in question, so as to agree on a general range of topics that may be included in the potential trade agreement. The Commission also opens a dialogue with the European Parliament and the Council of the EU (in particular, the Trade Policy Committee). This process may also lead to the adoption of a non-binding Resolution by the European Parliament. Ultimately, the Commission must request formal authorisation from the Council of the EU, which is provided via '*negotiating directives*'. Once the Council of the EU adopts

the negotiating directives, the Commission is formally authorised to negotiate on behalf of the EU and, at least until now, also on behalf of the EU Member States. After months – usually years – of negotiation rounds, the final text of an agreement is '*scrubbed*' for legal issues and initialled by the parties. It is then submitted to the European Parliament and the Council of the EU. The Council of the EU decides on the signature and conclusion of the agreement, which, once signed, is sent to the European Parliament for consent. If the agreement falls within the exclusive competence of the EU, it can be adopted via a final Decision by the Council of the EU once such consent is given. However, if the agreement includes areas of shared competence between the EU and its Member States (known as a '*mixed agreement*'), it must also be ratified by all 28 EU Member States before it can be adopted via a final Decision by the Council of the EU. Moreover, agreements falling within the exclusive competence of the EU require only a favourable qualified majority vote by the Council of the EU, whereas '*mixed agreements*' require unanimous approval by the Council of the EU.

This process has gained a spotlight in the past few years due to the conclusion of numerous trade and investment agreements by the EU, notably the EU-Singapore Free Trade Agreement (hereinafter, EUSFTA) and, more recently, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU. In May 2015, the EU and Singapore initialled the final text of the EUSFTA. Soon after, a disagreement arose between the Commission and delegations from EU Member States over whether some parts of the EUSFTA deal with areas that do not fall within the exclusive competence of the EU under the Treaty of the Functioning of the EU (TFEU), and thus whether the ratification process of the agreement should be different. The Commission referred the matter to the CJEU for an advisory opinion. On 16 May 2017, the CJEU concluded that "*the provisions of the agreement relating to non-direct foreign investment and those relating to dispute settlement between investors and States do not fall within the exclusive competence of the EU, so that the agreement cannot, as it stands, be concluded without the participation of Member States*". As a result, any agreements negotiated by the EU, which include provisions on non-direct foreign investment and investor-to-state dispute settlement (hereinafter, ISDS), are considered '*mixed agreements*' and must be adopted by the Council of the EU and ratified by all 28 EU Member States for full implementation. The requirement for such agreements to be ratified by all EU Member States leads to political challenges, infamously observed recently when the regional Parliament of Wallonia in Belgium threatened not to ratify the Comprehensive Economic and Trade Agreement between Canada and the EU, as required under Belgian law.

To alleviate this issue, it has been suggested that the EU '*split*' trade and investment agreement negotiations so that one includes only areas where the EU has exclusive competence and the other includes those provisions where the EU and its Member States share competence. It cannot be ruled out that this debate is the underlying reason for the postponement of the Commission's submission of draft negotiating directives to the Council of the EU on the envisioned EU-Australia FTA and the EU-New Zealand FTA. With respect to the trade relations between the EU and, respectively, Australia and New Zealand, the Member of the European Parliament (hereinafter, MEP) Daniel Caspary from Germany, who is the Rapporteur for Australia and New Zealand trade relations, has recently submitted draft reports on the negotiating mandate for EU trade negotiations with these two countries. MEP Caspary suggested to include a call on the Commission and the Council in the future resolution of the European Parliament "*to clearly distinguish between an agreement on trade and the liberalisation of foreign direct investment (FDI), only containing issues under exclusive EU competence, and a second agreement on investment protection, including on FDI and non-direct investment, which would be subject to an Investment Court System*".

Thus, MEP Caspary goes as far as suggesting that the trade agreements negotiated and concluded under EU competence should also omit investment protection, including the protection of foreign direct investment (hereinafter, FDI), even though the CJEU concluded that these areas fall within the exclusive competence of the EU. One reason that the EU may be in favour of such an approach, could be the lack of options for investors to litigate FDI issues under an agreement falling under the exclusive competence of the EU, if the second agreement on shared competence (which would include ISDS) has not yet been adopted and ratified. Such a situation would make it difficult, if not impossible, for foreign investors to be assured of the necessary legal protection for their direct investments abroad. Indeed, at least with respect to trade relations between Australia and the EU, investment is a major area. Data shows that the EU is the largest investor in Australia, with EUR 145.8 billion in FDI in 2015 alone, which itself only accounted for approximately 15% of the total investment by the EU in Australia during that year.

With respect to the trade relations between Chile and the EU, the EU-Chile Association Agreement entered into force in February 2003 and included an FTA pillar. Since its entry into force, bilateral trade in goods between the two economies had doubled by 2015, from EUR 7.7 billion to EUR 16.6 billion. Nonetheless, Chile and the EU have opened a dialogue to modernise the trade-related aspects of the agreement, in order to better align it with more recently comprehensive trade and investment agreements. With respect to investment, the EU has a significant trade surplus over Chile, where outward FDI in 2015 amounted to EUR 42.4 billion, while inward FDI stocks were only EUR 0.3 billion. Data from the EU shows that, in 2015, EU's imports from Chile were dominated by crude materials except fuels (27.9%, mainly copper), manufactured goods (25.8%), and food and live animal products (24.7%). EU exports to Chile were overwhelmingly composed of machinery and transport (52.2%), followed by chemical products (15.3%) and manufactured goods (13.4%).

It has been suggested that the already submitted draft mandates, such as that pertaining to an updated EU-Chile FTA, may not be affected by the Opinion of the CJEU. However, when it comes to selecting an approach for negotiating and concluding future trade agreements for the EU, in particular with Australia, Chile and New Zealand, the affected stakeholders may be in favour of the so-called '*bifurcated*', or '*split*', approach in the light of the recent CJEU Opinion (even if such an approach may not be necessary for the EU-Chile FTA). Indeed, it appears unnecessary to open up the possibility of delayed full implementation of these agreements due to concerns by national and sometimes regional parliaments of EU Member States, which negatively affect trade in goods and services, when the negative public perception of comprehensive trade and investment agreements has largely focused on issues surrounding investment, and ISDS in particular.

On a practical level, negotiations of trade agreements are already organised by area, with sector and topic experts driving negotiations with counterparts from respective third countries. Any dependence between such areas during negotiation mainly comes about during compromises and trade-offs, such as the liberalisation of one sector by one party '*in exchange*' for the liberalisation of another by the other negotiating party. But with respect to investment, the leverage would logically be held by the larger economy, which is almost always the EU, and the nature of investment itself is one where other countries welcome capital from the EU and are unlikely to block liberalisation during the negotiations. With respect to the EU-Chile FTA specifically, a '*split*' approach would also make sense, given the coverage area of the previous agreement on trade and services, and that modern investment provisions would serve as an expanded scope of the agreement.

The larger question thus becomes whether the EU should, and will, defer its competence in investment-related areas outside of non-direct foreign investment and dispute settlement,

namely concerning FDI and investment protection, in order to create a '*clean break*' of investment provisions in trade agreements, and to ensure legal avenues of redress for all types of investment. Interested stakeholders should take advantage of the delay by the Commission of its submission of the negotiating directives, and open dialogues with their respective EU Member State representatives, as well as the Commission itself, where possible. It is now expected that the Commission will submit its draft negotiating directives at the end of September 2017. Action should be taken by businesses now, given that manufacturers of goods and service providers should have a strong interest at ensuring that agreements are implemented swiftly, and that investors can have their investments fully protected abroad. All of these interests can be best met by advocating for a '*split*' approach to future EU agreements.

Consequences of mandatory country of origin labelling (COOL) of food on the EU internal market

At the EU Agriculture and Fisheries Council on 17-18 July 2017, at the request of the Belgian delegation, EU Member States' Ministers discussed the impact on the internal market of national rules introducing mandatory labelling of the country of origin (hereinafter, COOL) of food and, in particular, for milk and foodstuffs containing milk or meat as an ingredient.

The Belgian delegation at the EU Agriculture and Fisheries Council presented a document entitled "*Consequences of the mandatory labelling of the country of origin on the internal market*" in which it noted that the EU's food labelling rules, established by *Regulation (EU) No 1169/2011 on the provision of food information to consumers* (hereinafter, FIR), introduce a set of provisions regarding origin labelling of food, while certain measures of the FIR may be supplemented by national rules (under strict conditions), like in the case for the mandatory COOL of food. Belgium noted that several EU Member States had notified national rules for milk and foodstuffs containing milk or meat as an ingredient to the European Commission (hereinafter, Commission) and that, although a strict link between the quality of the product and the origin had to be proven and several EU Member States did not agree with the notification, the Commission did not react to the notification and tacitly accepted those national measures considered as '*test measures*'.

In fact, according to Article 39(2) of the FIR, EU Member States may introduce additional measures concerning mandatory COOL only where there is a proven link between certain qualities of the food and its origin or provenance. EU Member States must notify such measures and provide credible evidence to the Commission that the majority of consumers attaches significant value to the provision of that information. Apart from the claimed wish of the consumer to know the origin or provenance of a product, a link must be established between the respective EU Member State of origin and a particular quality attribute. Such link must be established and corroborated by the respective EU Member State with respect to every single COOL scheme.

In particular, France and Italy have started trial periods for COOL schemes for certain food products (see *Trade Perspectives*, Issue No. 1 of 13 January 2017 and Issue No. 8 of 21 April 2017). On 1 January 2017, France started a two-year trial of a mandatory 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*). Italy adopted, on 9 December 2016, a Decree requiring COOL for milk and dairy products (*i.e.*, *Decreto 9 dicembre 2016 Indicazione dell'origine in etichetta della materia prima per il latte e*

i prodotti lattieri caseari, in attuazione del regolamento (UE) n. 1169/2011, relativo alla fornitura di informazioni sugli alimenti ai consumatori), which applies for a trial period until 31 March 2019.

Both, the French and Italian decrees provide 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 collection and transformation 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*" may be used instead of the name of the country or countries to designate the location of the relevant steps. Finally, should collection and transformation be carried-out in EU Member States and in countries located outside the EU, or if the origin is undetermined, the words "*EU or outside EU*" may be used. According to mutual recognition clauses in both national decrees, products lawfully produced or marketed in another EU Member State are not subject to the provisions of the Decree.

A number of further EU Member States have adopted (*i.e.*, Finland, Greece, Lithuania, Portugal) or are already in the process of adopting (*i.e.*, Romania and Spain) similar COOL legislation on milk and milk used as an ingredient in dairy products. After being notified of the different measures, in accordance with the notification procedure provided in Article 45 of the FIR, the Commission has tacitly given the green light to the French, Italian, Lithuanian and Portuguese schemes, given that that they are limited in time, include a mutual recognition clause (providing that products lawfully produced or marketed in another EU Member State are not subject to the schemes), "*EU*" or "*non-EU*" labels, and that the respective EU Member States have committed to report on the impact of these schemes on the internal market.

However, these national COOL requirements may already restrict the free movement of goods, if they discriminate against businesses based in another EU Member State and thereby possibly violate Article 34 of the Treaty of the Functioning of the EU (hereinafter, TFEU). The effect of mandatory origin labelling on all operators that are subject to the COOL requirements is an added cost for processors, which will have consequences at all levels of the dairy supply chain, from farmers to consumers. More importantly, the national COOL measures appear to encourage local sourcing without regard to the detrimental impact that it may have on established supply chains, which transcend national, and sometimes even EU, borders. Although the national COOL requirements do not apply to products lawfully produced or marketed in another EU Member State, they may still have a detrimental effect on the internal market. For example, a Belgian cheese made with Belgian milk does not need to state '*Origin: Belgium*' when marketed in France. However, it can be easily identified as a foreign product because it does not state '*Origin: France*' or it might not even reach the French retail stage at all because retailers no longer buy it, leading to *de facto* discrimination (in form of a potential *de facto* '*boycott*' by retailers in France). Another example is the decline of liquid milk imports by France since French processors, due to pressure from retailers, appear to prefer milk of French origin in order to be able to indicate that origin on the product label according to the COOL scheme.

At the EU Agriculture and Fisheries Council on 17-18 July 2017, the Belgian delegation argued that these national COOL measures already show to have an impact on the internal market. As an example to show the effects of these measures, Belgium highlighted the

development of the trade flows from Belgium to France during the last year: the French COOL scheme was announced for the first time in the summer of 2016 and, as many contracts in the retail sector are fixed-term contracts, some were abandoned or not renewed in order to prepare for the national rules establishing COOL. According to Belgium, it appears that some major multinational retail companies, with big acquisition power, have increased the pressure on the other partners of the food supply chain to adapt for these national rules. Especially fresh milk producing dairy companies immediately felt an impact. The monitoring of the meat and dairy product volumes exported to France, which were closely checked by the sector, and the figures of the Belgian National Bank also show decreasing exports. Belgium states that the first '*hint of trouble*' came with the announcement of the sector in the spring of 2016 that there was a decline of 17% for milk compared to the same period in 2015. A further decline was attributed to the actual start of the measure at the end of 2016 and appears to be continuing. According to Belgium, these sectoral figures show that the internal market is under pressure because of this French initiative. By comparison, the export of dairy from Belgium to other EU markets without COOL schemes in force (*e.g.*, Germany, the Netherlands) remained stable over the same period.

Therefore, Belgium urged the Commission to take action, requesting an intermediate impact evaluation of the effects of the different national measures on the internal market after one year, as of the implementation of the first national decree. The Commission invited other EU Member States to also gather market figures on the evolution of the different trade flows.

It is also important to note that not all the trade diversions will be visible in the statistics. For instance, it is likely that, because of its COOL scheme, France now imports less consumer butter (*i.e.*, retail butter for direct consumption). However, because France structurally requires more butter than it produces, it will have to continue importing. The possible decrease in consumer butter imports would then have to be compensated by an increase in the imports of butter for bakery and other food industry applications, where the origin considerations might play less of a role. The French Customs import figures of milk and cream so far in 2017 (January-May) show a clear decrease of the imports from Belgium and Germany in comparison with the two previous years.

In the debate at the EU Agriculture and Fisheries Council on 17-18 July 2017, some ministers warned against mandatory origin labelling which would, in their opinion, not only be costly and burdensome, but also detrimental to the internal market and the free movement of goods. Several ministers supported the Belgian request to conduct an impact assessment on the national COOL schemes for food. Other delegations put emphasis on transparency, the right of the consumer to be correctly informed, and the growing societal demand to know the origin of food, in order to support the idea of an EU-wide mandatory labelling of origin.

If, after the conclusion of the test phases and the different impact assessments, the Commission decided to act on national COOL schemes, it might decide to send a reasoned opinion to the respective EU Member States, urging them to remove the discriminatory practices affecting the marketing of dairy products. The Commission may consider that the national requirements do, in fact, restrict the free movement of goods, as they appear to discriminate against businesses based in another EU Member State. The respective countries may then have two months to notify the Commission of measures taken to remedy the situation. Otherwise, the Commission may decide to refer the case to the Court of Justice of the EU. Not too long ago, in February 2017, the Commission initiated infringement procedures against Romania and Hungary over laws promoting domestic food over imports. These cases could be analysed in comparison to the national COOL schemes, although the respective Hungarian and Romanian laws were arguably much more protectionist in nature

(requiring, *e.g.*, a certain percentage of products to be sourced by retailers from short, *i.e.*, regional or national, supply chains).

Challenging eventual sanctions imposed by national authorities for non-compliance with the new national COOL schemes might be a way to address them. However, as noted above, operators legally marketing their products in other EU Member States, do not need to comply with the French COOL requirements. The '*sanction*' may indeed be that the products do not reach the French retail market because of not being '*local*' and attractive and, therefore, being avoided by French retailers.

The next EU Member State likely to adopt a national COOL scheme for milk and dairy products appears to be Spain. The measure is poised to be adopted after the summer break. There are also indications that the introduction of a national COOL scheme in Germany may become a topic in the general elections in the autumn, although it would be surprising to see a change in the long-standing position of Germany in favour of voluntary COOL with harmonised rules at EU level. The increased (regulatory) activity in EU Member States on COOL and the debate within the EU Agriculture and Fisheries Council indicate that these developments are continuing to gain momentum. Considering the implications laid out above, they 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. It is clear that an internal market disciplined by multiple different COOL schemes is hardly business-friendly and arguably also non conducive to consumers' clarity and not ideal to foster greater EU economic integration. Whatever the case, these schemes would have to be consistent with EU law and WTO obligations, so as to avoid potentially costly and destabilising litigation, as well as commercial and legal uncertainty for economic operators.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2017/1348 of 19 July 2017 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Implementing Regulation (EU) No 1008/2011, as amended by Implementing Regulation (EU) No 372/2013, on imports of hand pallet trucks and their essential parts originating in the People's Republic of China by imports consigned from Vietnam, whether declared as originating in Vietnam or not, and making such imports subject to registration*

Customs Law

- *Commission Implementing Regulation (EU) 2017/1384 of 25 July 2017 on the issue of licences for importing rice under the tariff quotas opened for the July 2017 subperiod by Implementing Regulation (EU) No 1273/2011*

- *Commission Implementing Regulation (EU) 2017/1351 of 19 July 2017 fixing the allocation coefficient to be applied to the quantities on which applications for import licences and applications for import rights lodged from 1 to 7 July 2017 are based and establishing the quantities to be added to the quantity fixed for the sub-period from 1 January to 31 March 2018 under the tariff quotas opened by Regulation (EC) No 616/2007 for poultrymeat*

- *Commission Implementing Regulation (EU) 2017/1350 of 19 July 2017 fixing the allocation coefficient to be applied to the quantities covered by the applications for import licences lodged from 1 to 7 July 2017 under the tariff quotas opened by Regulation (EC) No 341/2007 for garlic*

- *Commission Implementing Regulation (EU) 2017/1349 of 19 July 2017 suspending submission of applications for import licences under the tariff quotas opened by Regulation (EC) No 891/2009 in the sugar sector*

- *Decision No 1/2017 of the Joint Committee of the Regional Convention on pan-Euro-Mediterranean preferential rules of origin of 16 May 2017 as regards the request of Ukraine to become a Contracting Party to the Regional Convention on pan-Euro-Mediterranean preferential rules of origin*

Food and Agricultural Law

- *Commission Implementing Decision (EU) 2017/1387 of 24 July 2017 authorising the placing on the market of an enzyme preparation of prolyl oligopeptidase produced with a genetically modified strain of Aspergillus niger as a novel food ingredient under Regulation (EC) No 258/97 of the European Parliament and of the Council (notified under document C(2017) 4975)*

- *Commission Delegated Regulation (EU) 2017/1353 of 19 May 2017 amending Regulation (EC) No 607/2009 as regards the wine grape varieties and their synonyms that may appear on wine labels*

Other

- *Commission Decision (EU) 2017/1392 of 25 July 2017 amending Decision 2014/350/EU establishing the ecological criteria for the award of the EU Ecolabel for textile products (notified under document C(2017) 5069)*

- *Council Decision (EU) 2017/1391 of 17 July 2017 on the position to be adopted, on behalf of the European Union, within the Sanitary and Phytosanitary Management Sub-Committee established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the modification of Annex V to that Agreement*

- *Decision No 2/2015 of the EU-Georgia Trade and Sustainable Development Sub-Committee of 18 November 2015 establishing the list of experts on trade and sustainable development [2017/1366]*

- *Decision No 1/2015 of the EU-Georgia Trade and Sustainable Development Sub-Committee of 18 November 2015 adopting its Rules of Procedure [2017/1365]*

NOTE TO SUBSCRIBERS

Dear Friends and Readers,

Please note that Trade Perspectives© will take an editorial break during the WTO's August recess and will resume its fortnightly publication schedule on 8 September 2017. 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 Autumn.

The Trade Perspectives© Team

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