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## The European Commission's new complaint mechanism for the enforcement of trading partners' trade commitments – towards better enforcement?

On 16 November 2020, the European Commission (hereinafter, Commission) launched a new complaint system "*for reporting market access barriers and breaches of trade and sustainable development commitments in the EU's trade agreements and under the Generalised Scheme of Preferences*". The new mechanism reflects the Commission's increased efforts "*to strengthen the enforcement and implementation of trade agreements*", which is one of the key objectives of the current Commission. Importantly, the new mechanism allows stakeholders to flag issues and trigger investigations by the Commission not only with regard to market access, but also in relation to non-compliance by third countries with commitments on trade and sustainable development (hereinafter, TSD) obligations under preferential trade agreements (hereinafter, PTAs) with the EU, as well as with commitments under the EU's Generalised Scheme of Preferences (hereinafter, GSP).

### *The EU's increasing focus on implementation and enforcement*

In the past ten years, the EU has concluded a number of PTAs and, following their conclusion, the Commission has placed increasing focus on implementation. This is now turning into a focus on enforcement. On 28 October 2020, the Commission, the European Parliament and the Council of the EU reached a political agreement on the revision of the EU's so-called Enforcement Regulation (see *Trade Perspectives*, Issue No. 1 of 17 January 2020). Commission Executive Vice President and European Commissioner for Trade *Valdis Dombrovskis* stated that "*the agreement expands the EU's ability to defend its interests when a trade dispute is blocked under the WTO*". This will also apply to bilateral trade agreements. Notably, the revised Enforcement Regulation will allow the EU to take countermeasures "*not just on goods, but also on services and certain aspects of Intellectual Property Rights*". The newly launched complaint mechanism will complement the EU's enforcement toolbox adding to the already existing monitoring systems the opportunity for several eligible EU stakeholders to submit structured complaints on market access barriers or breaches of TSD and GSP commitments by third countries.

### *Linking trade and sustainable development*

On its websites, the Commission states that EU law "*requires all relevant EU policies, including trade policy, to promote sustainable development*" and EU trade policy strives to combine economic objectives with commitments on social justice, fair labour standards, and high

environmental standards. Notably, recent EU PTAs, starting with the EU-Korea Free Trade Agreement that was signed in 2011, contain increasingly detailed chapters on trade and sustainable development (hereinafter, TSD Chapters). The Commission and EU Member States coordinate on the monitoring of compliance within the TSD Expert Group. Similarly, the Commission established the GSP Expert Group, which, together with EU Delegations in third countries, monitors the compliance with GSP commitments. Furthermore, the TSD Chapters foresee the establishment of EU Domestic Advisory Groups, which monitor the implementation and enforcement of the TSD Chapters and flag issues to the Commission.

### *The EU's first Chief Trade Enforcement Officer*

Committed to strengthening the EU's rights at the multilateral and bilateral level, on 24 July 2020, the Commission appointed Mr. *Denis Redonnet* as its first Chief Trade Enforcement Officer (hereinafter, CTEO), who heads a new Directorate responsible for enforcement within the Commission's Directorate-General for Trade. The CTEO's task is to strengthen the implementation and enforcement of EU trade policy and, more specifically: 1) Strengthening the implementation of the EU's multilateral, bilateral, and regional trade agreements; 2) Ensuring compliance by the EU's trading partners; 3) Managing the EU's complaint mechanism for all EU-based stakeholders; and 4) Coordinating dispute settlement proceedings between the EU and third countries.

### *The EU's new complaint mechanism*

On 16 November 2020, the Commission launched its new complaint system, which is available via the Commission's new *Access2Markets* website and further explained in the *Operating guidelines for the Single Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements*. In simple terms, the new complaint mechanism is a structured opportunity for eligible EU stakeholders to raise trade irritants, and a resource for the Commission to identify issues that are to be raised and addressed with the EU's trading partners. The objective of the mechanism is to improve the efficiency and effectiveness of EU enforcement action, namely by providing the Commission with sufficient information to initiate discussions with third countries.

The new mechanism provides the possibility for EU stakeholders to submit: 1) Complaints on market access issues; 2) Complaints on non-compliance with TSD commitments; and 3) Complaints on the non-compliance with commitments under the EU's GSP. Under the new complaint mechanism, complaints relating to market access issues are admissible if they are made by: 1) An EU Member State; 2) An entity having its registered office, central administration or principal place of business within the EU; 3) An industry association of EU companies; 4) An association of EU employers; or 5) A trade union or trade union association formed in accordance to the laws of any EU Member State. For complaints regarding alleged breaches of TSD commitments or commitments under the EU's GSP scheme, complaints may also be submitted by citizens of any EU Member State, as well as by a Non-Governmental Organisation (NGOs) established in accordance with the laws of any EU Member State.

The new complaint mechanism functions on the basis of two complaint forms, one on market access barriers and another one related to TSD commitments and commitments under the GSP scheme. In order for a complaint on market access issues to be admissible, the complainant must demonstrate that it is "*directly*" concerned by the alleged barrier. In other words, entities may only submit a complaint about barriers affecting the products they produce or the services they provide. Complaints on market access are possible on any kind of trade-related measure imposed by a third country, such as tariff measures or practices, trade defence instruments and subsidies, or any sanitary and phytosanitary (SPS) measures or technical barriers to trade (TBT).

Complainants are required to provide the Commission with detailed information on the complaint, notably factual and legal information regarding the issue or violation, as well as information on the economic impact or, for complaints on TSD and GSP commitments, the

impact and seriousness and gravity of the violation. With respect to the legal and factual requirements, the complainant must, notably, provide a description and the text of the measure or barrier, and provide an indication on whether the measure is inconsistent with any relevant provision in an agreement to which the EU and the third country are parties.

With respect to complaints related to TSD commitments, the complaint system only allows stakeholders to submit complaints against countries with which the EU has concluded a trade agreement that contains a TSD Chapter. With respect to complaints related to commitments under the EU's GSP scheme, the complaint system only allows stakeholders to submit complaints against GSP beneficiary countries. For instance, currently it is not possible to file a complaint on TSD violations against Mexico, as the current trade agreement between the EU and Mexico does not include a TSD Chapter. However, this will change once the modernised EU-Mexico trade agreement enters into force, as it will include a TSD Chapter.

***Addressing complaints***

After a stakeholder submits a complaint, the Commission will assess the complaint and might engage with the complainant in order to gather additional information and evidence. Following the assessment, the complainant will be informed as to whether the complaint leads to an enforcement action, accompanied by an enforcement action plan to address the issue. In this context, the Commission stated that it would use all tools at its disposal, ranging "*from diplomatic means to dispute settlements*".

There is no set timeframe for the Commission to respond to a complaint, but the Guidelines note that it would be necessary to prioritise the review of complaints received in order to obtain swift results and ensure the most efficient use of the mechanism.

***An important opportunity for EU stakeholders***

During a recent meeting with Civil Society, CTEO *Redonnet* stated that the Commission and EU Member States would reinforce their efforts to increase the monitoring of the implementation and enforcement of EU trade agreements. The new structured complaint mechanism provides an important opportunity for all EU-based eligible stakeholders to raise issues and to trigger investigations by the Commission.

The Commission's new complaint mechanism is already operational. It is now up to stakeholders to take advantage of the mechanism and flag market access issues in third countries and issues related to TSD and GSP commitments to the Commission.

## Unlocking new trade opportunities in the Asia-Pacific region? The Regional Comprehensive Economic Partnership (RCEP) Agreement is finally signed

On 15 November 2020, following eight years of negotiations and countless delays, 15 countries in the Asia-Pacific region signed the world's biggest trade agreement, the *Regional Comprehensive Economic Partnership (RCEP) Agreement*. The RCEP Agreement is an ASEAN-led free trade agreement (hereinafter, FTA), grouping the ten ASEAN Member States (*i.e.*, Brunei-Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam), and the five regional countries with which ASEAN already has free trade agreements, namely Australia, China, Japan, South Korea, and New Zealand (*i.e.*, the so-called ASEAN+1 FTA partners, minus India).

The RCEP Agreement has the potential to transform the region into an integrated market of about 2.27 billion people (*i.e.*, 30% of the world's population), a combined GDP of USD 26.2 trillion (*i.e.*, 30% of global the gross domestic product (GDP), and nearly 28% of global trade. The RCEP will open up opportunities for businesses, providing greater market access across all areas of trade – goods, services, and investments. The signing of the RCEP signals a strong

commitment to keep markets open, to ensure supply chain connectivity in the Asia-Pacific region, and to provide much-needed support and optimism for job creation and economic recovery from the *Covid-19* pandemic.

***The RCEP builds on ASEAN's bilateral FTAs with its key trading partners***

The RCEP negotiations were launched in November 2012 by the ten ASEAN Member States and the six regional countries with which ASEAN already has free trade agreements with the intention of strengthening the regional economic architecture. In November 2019, India withdrew from the RCEP negotiations, noting that its key issues and concerns were not being adequately addressed. Nevertheless, RCEP Parties kept the door open for India through the *Ministers' Declaration on India's Participation in the Regional Comprehensive Economic Partnership (RCEP)*, which acknowledges the strategic importance of India's participation to establish stronger economic linkages and connectivity for the benefit of all people in the region and further development of the global economy. Notably, the RCEP links together China, Japan and Korea, which are Asia's first, second, and fourth-largest economies, respectively, providing the push and momentum to finally conclude the stalled China-Japan-Korea FTA talks.

Comprising 20 chapters, with a total of 17 annexes and 54 market access schedules, the RCEP Agreement is a modern and comprehensive FTA covering commitments in the areas of trade in goods, trade in services, investment, dispute settlement, and economic and technical cooperation. Importantly, the RCEP Agreement goes beyond the existing agreements concluded by the ASEAN Member States with Australia, China, Japan, South Korea, and New Zealand (hereinafter, ASEAN+1 FTAs) and includes commitments on electronic commerce, intellectual property, Government procurement, competition, and small and medium-sized enterprises (SMEs). The RCEP Agreement intends to provide new trade and investment opportunities for businesses.

***The RCEP Agreement provides important benefits to traders in the Asia-Pacific region***

Studies indicate that the RCEP Agreement could boost global trade by USD 500 billion in the next ten years. However, this requires that businesses do take advantage of the new commitments by the Parties, once the RCEP is ratified and starts being implemented.

The RCEP Agreement aims at ensuring transparent and predictable trade rules. More specifically, the RCEP Agreement reaffirms the Parties' WTO commitments on the publication and notification of their trade regulations, which aims at addressing a key business concern, namely the lack of information on non-tariff measures (NTMs). Despite the transparency system not being as ambitious as that of the ASEAN Trade in Goods Agreement (ATIGA), Article 2.18 of the RCEP Agreement provides an innovative platform for Parties to conduct technical consultations on NTMs that adversely affect trade between them, establishing a timeframe within which the consultations should be resolved (*i.e.*, 180 days from the request of technical consultations), which can be shortened due to the urgency of the matter or if the consultations concern perishable goods. Moreover, these discussions must be transparent and must provide any other RCEP Party the opportunity to join the consultations whenever they have an interest in doing so, subject to the consulting Parties' consent.

Businesses will be able to benefit from substantial cost-savings under the RCEP, with the Parties committing to the gradual removal of Customs duties on about 92% of products over 20 years in accordance with each Party's *Schedule of Tariff Commitments* (Annex I of the RCEP Agreement), while some tariff lines can be traded duty-free upon its entry into force. This will likely encourage businesses to source raw materials from other RCEP Parties, increasing foreign direct investments (FDI) into the region and fostering regional value chains.

Under the RCEP Agreement, the Parties negotiated exclusions for sensitive products from tariff reductions, particularly for agricultural products and other regulated goods. For instance, Indonesia has committed to eliminating tariffs on 91% of its tariff lines in the coming years,

while the other 9% have been designated as sensitive products, which means that, *inter alia*, rice, weapons, and alcoholic beverages are not subject to the liberalisation commitments. Japan excluded its key agricultural products, namely rice, wheat, beef, pork, dairy, and sugar from liberalisation in order to protect domestic farmers from a potential influx of more competitive imports. More specifically, Japan will abolish tariffs on 56% of agricultural products imported from China, 49% of those from South Korea, and 61% of agricultural products from ASEAN Member States, as well as from Australia and New Zealand. Additionally, certain Parties will grant market access through tariff-rate quotas (TRQs) to other Parties. For instance, vis-à-vis China, Viet Nam does not exclude any products from liberalisation, but has established a list of 30 products that will be subject to a lower (in quota) tariff-rate, but then subject to a higher tariff-rate once the respective quota is exceeded.

### *Unified rules of origin*

Under the RCEP Agreement, businesses will benefit from preferential treatment under a unified set of rules and procedures when trading their products between and among RCEP Parties. Until now, diverging rules and procedures, particularly regarding origin criteria and certification procedures, under various FTAs in the region, had led to complex rules, which discouraged traders to take advantage of them. Most notably, the RCEP Agreement will provide for unified rules of origin where, essentially, the criteria to determine whether a product may benefit from preferential treatment under the agreement are the same for all RCEP Parties. Moreover, businesses will only need one origin certification document to cover all RCEP Parties, which should significantly expedite the processes of verifying origin qualification and documentation. The unified rules of origin under the RCEP are expected to facilitate supply-chain management, reduce transaction costs borne by businesses for trading with multiple countries in the wider region, as well as create a more stable environment for trade.

### *The chapter on electronic commerce*

The RCEP Agreement contains a chapter on electronic commerce, an important innovation compared to the existing ASEAN+1 FTAs and the ASEAN Trade in Goods Agreement (ATIGA). While it may not be as sophisticated as the chapter on electronic commerce in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP), which links Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam, it still contains important elements. The inclusion of this chapter aims at enhancing the regulatory environment for businesses trading digitally in the region and at supporting consumers' confidence in online transactions. In essence, the chapter on electronic commerce sets out provisions that encourage the RCEP Parties to improve the administration and relevant processes for trade using electronic means. The chapter also requires Parties to adopt or maintain a legal framework that creates a conducive environment for the further development of electronic commerce, which is supposed to cover areas such as online consumer protection, online personal information protection, transparency, and paperless trading.

Pursuant to Article 12.2 of the RCEP Agreement, the Parties agree to refrain from imposing Customs duties on electronic transmissions, in line with the WTO's *moratorium* on e-commerce. Additionally, Article 14.14 of the RCEP Agreement prohibits data localisation requirements, unless they are necessary to achieve a Party's public policy objectives or to protect its security interests.

### *Next steps towards the effective implementation of the RCEP*

After its signing, the Parties to the RCEP Agreement will commence their respective domestic processes to ratify the agreement. However, the RCEP Agreement will only enter into force once six of ten ASEAN Member States and three of the five other Parties have deposited their instruments of ratification, acceptance, or approval with the ASEAN Secretary-General. The RCEP Agreement is, therefore, not expected to come into effect before the end of 2021 or the beginning of 2022.

The increased economic opportunities will likely also increase competition in the region. During this ratification period, it is, therefore, critical for companies to prepare and strategically plan on how to leverage the trade preferences that the RCEP Agreement will deliver to reduce trade costs and gain competitive advantages in the RCEP Parties' markets. Such assessment should include determining the tangible benefits of the RCEP Agreement *vis-à-vis* the existing ASEAN+1 FTAs, which will remain effective even as the RCEP enters into force, as well as reviewing their current supply chains to determine if there is an opportunity to expand into the region's growing markets.

## As the transition period is coming to an end, UK food regulation in key areas will remain, for now, clearly aligned to EU rules

On 31 December 2020, the transition period following '*Brexit*', which still closely linked the UK to the EU since 1 February 2020, will most likely come to its end and the UK will regain full regulatory control. This includes the marketing of food additives, an area for which the UK's Food Standards Agency (hereinafter, FSA) has reportedly declared that the list of food additives currently authorised for use by the EU, and, therefore, also in the UK, would not change at the end of the transition period. The expectation is that the UK would still continue to follow EU standards in this area.

This includes the food additive and sweetener *aspartame*, although UK scientists from the University of Sussex have expressed concerns that the European Food Safety Authority (hereinafter, EFSA) has failed to demonstrate the safety of *aspartame* and have suggested that it be banned in the UK. The UK's future regulatory approach on agro-food issues is of significant concern for food businesses around Europe and globally. Given long established supply chains, any regulatory changes might have important implications on trade.

### *The UK's new legal framework for food additives*

*Aspartame* is a sweetener authorised in the EU as a food additive under *Regulation (EC) No 1333/2008 of the European Parliament and of the Council on food additives* to be used in foodstuffs such as drinks, desserts, sweets, dairy, chewing gums, energy-reducing and weight control products, as well as a table-top sweetener (see *Trade Perspectives*, Issue No 15 of 26 June 2019). Anticipating '*Brexit*' and in order to avoid any legal gaps, in its 2018 *EU Withdrawal Act*, the UK decided to transfer all EU legislation into the UK legal system at the end of the transition period. In this context, extensive powers were given to the UK Government to establish secondary legislation in the form of statutory instruments (hereinafter, SIs) to provide for additional implementing rules.

The SIs concerned with food additives, The Food Additives, Flavourings, Enzymes and Extraction Solvents Regulations 2019/860 transfer many of the current provisions of the EU's regime on food additives into UK law, but also implement the following key changes: 1) They revoke the EU's provisions requiring re-evaluations; 2) They discontinue the monitoring and reporting of the consumption patterns of food additives; and 3) They remove the reference to enzymes in wine-making practices and to smoke flavourings in food. Additionally, Regulations 2019/860 provide the UK Government with discretionary power to amend legislation on food additives by means of future secondary legislation. According to the Explanatory Memorandum to the UK's 2018 EU Withdrawal Act, the power given to the UK Government is aimed at correcting what are considered as shortcomings in the incorporated EU provisions, for example, where a provision has no longer practical relevance, such as references to EU Institutions.

### *Commercial impact of the UK food safety policy*

Low calorie sweeteners, such as *aspartame*, are widely used in foods and beverages and provide consumers with a wide choice of sweet-tasting options with low or no calories. In case the UK Government were to decide to ban the use of *aspartame* for foods marketed in the UK, food businesses using the artificial sweetener would have to adapt their products to comply with the new rules.

As the UK Government is in the process of shaping its own food safety policy, some scientists arguing that *aspartame* may negatively impact human health suggested that '*Brexit*' could provide the opportunity to ban its use for food marketed in the UK. *Aspartame* has been linked to adverse health effects by a series of studies and some researchers claim that the EFSA authorised the placing of the artificial sweetener on the EU market without taking into account the existing evidence regarding its potential to be harmful for human health. Certain UK scientists have long maintained the position that the consumption of *aspartame* may be associated with the risk of brain lesions, cancer, and neurological disorders, and have challenged the EFSA to explain why it did not ban or more severely restrict its conditions of use.

However, the *International Sweeteners Association* (ISA) maintains that the EFSA's re-assessment carried out in 2013 represented the most comprehensive assessment on the safety of aspartame that had ever been undertaken. In its scientific evaluation, the EFSA concluded that *aspartame* "*does not pose a safety concern at current levels of exposure*" and that an "*acceptable daily intake (ADI) of 40mg/kg of body weight per day is considered protective for the general population and consumer exposure is considered to be well below this ADI*". The UK's FSA confirmed the EFSA's findings and added that, as part of research conducted to investigate the alleged claims and published in May 2015, it found that the consumption of *aspartame* does not cause any negative short-term effect on human health and declared that the list of food additives in the UK would not change at the end of the transition period.

### *Regulatory changes in the UK and implications for trade*

Potential future regulatory changes in the UK in key areas, such as food law, would affect not only the UK's ability to trade with the EU, but also with other key trading partners. Following the transition period, the UK will no longer benefit from the trade agreements previously negotiated by the EU and will trade with its commercial partners either on the basis of its own bilateral agreements or on the basis of the, typically less favourable, WTO rules.

The UK Government is currently in the process of shaping the food safety rules that will apply from the end of the transition period and the choices made not only vis-à-vis the area of food additives, but also in other sectors, will be of relevance for the negotiations of future bilateral trade agreements. In the food sector, this would not only concern food additives, but also other issues related to food safety, such as certain agricultural practices.

Recent studies on UK consumer preferences show that, while UK consumers have a negative view on certain practices common in third countries, such as an anti-bacterial treatment with chlorine used to wash chicken carcasses, and injecting livestock, notably cattle and pigs, with artificial growth-promoter hormones, they would welcome the increased choice offered by the presence of such products on supermarket shelves, provided that they are clearly labelled. However, UK consumers would expect to pay between 26 and 60% less for such products, compared to the equivalent products that have not been subject to these controversial treatments. It should be noted that treatments like chicken chlorination and the use of growth promoting hormones are not allowed in the EU and products having been treated with these substances may not be imported into the EU for placement on the EU market. In October 2020, a spokesperson of the UK's Department for the Environment, Food and Rural Affairs (hereinafter, DEFRA) declared that the same approach would "*be retained and enshrined in the UK law at the end of the transition period*".

Importantly, both methods described above are widely used by US farmers and a UK policy to continue the ban on products that underwent those controversial treatments would prevent most US-produced chicken and beef from entering the UK market. Negotiations for a trade agreement between the UK and the US are currently ongoing and trade in agro-food products appears to remain one of the most contentious issues. In its negotiating objectives of February 2019, the US pointed out its aim to "*establish a mechanism to remove expeditiously unwarranted barriers that block the export of US food and agricultural products in order to obtain more open, equitable, and reciprocal market access*".

Against the backdrop of the parallel negotiations between the UK and the EU, which are also still ongoing, the US' emphasis on market access for agricultural products may lead to a situation in which the UK finds itself pressured to adapt its future regulatory system to two fundamentally different approaches to agricultural and food regulation (see *Trade Perspectives*, Issue No. 5 of 13 March 2020). In that respect, the DEFRA has officially declared that "*this government will not sign a trade deal that will compromise on our high environmental protection, animal welfare and food standards*" and that "*chlorinated chicken and hormone injected beef are not permitted for import into the UK*".

***An uncertain future?***

In the process of shaping its food law and food safety regulatory framework, the UK will need to balance its non-trade concerns with the impact that any changes may have on the relationships with its trading partners. The applicable rules of its key commercial partners, namely the EU and the US, diverge in several regulated areas and, although it is becoming increasingly apparent that the UK will, at least for now, remain more closely aligned to current EU rules, this may be subject to change over time. Interested stakeholders and food business operators in the EU, the UK, and around the world should remain vigilant and observe the developments in relevant UK legislation and in the context of the UK trade negotiations.

## Recently Adopted EU Legislation

### Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2020/1768 of 25 November 2020 amending Regulation (EC) No 1484/95 as regards fixing representative prices in the poultrymeat and egg sectors and for egg albumin*

- *Commission Implementing Regulation (EU) 2020/1772 of 26 November 2020 amending Implementing Regulation (EU) 2017/2469 laying down administrative and scientific requirements for applications referred to in Article 10 of Regulation (EU) 2015/2283 of the European Parliament and of the Council on novel foods ( 1 )*

- *Commission Implementing Regulation (EU) 2020/1773 of 26 November 2020 amending Regulation (EC) No 429/2008 on detailed rules for the implementation of Regulation (EC) No 1831/2003 of the European Parliament and of the Council as regards the preparation and the presentation of applications and the assessment and the authorisation of feed additives ( 1 )*

- *Council Decision (EU) 2020/1757 of 19 November 2020 on the position to be taken on behalf of the European Union within the International Sugar Council concerning the accession of the United Kingdom to the International Sugar Agreement, 1992*

## Customs Law

- *Commission Implementing Regulation (EU) 2020/1739 of 20 November 2020 amending and correcting Implementing Regulation (EU) 2020/761 as regards the quantities available for tariff rate quotas for certain agricultural products included in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union, a tariff quota for poultry meat originating in Ukraine and a tariff quota for meat of bovine animals originating in Canada*

*Maria Esperanza Alconcel, Ignacio Carreño, Fabrizio De Angelis, Simone Dioguardi, Tobias Dolle, Michelle Limenta, Alya Mahira, Lourdes Medina Perez and Paolo R. Vergano contributed to this issue.*

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