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The EU Commission contemplates the introduction of a standardised EU-wide energy and carbon tax

Reports say that, during a meeting on 23 June 2010, EU Commissioners are to decide on the introduction of a new EU-wide energy and carbon tax (*i.e.*, a tax on the basis of the fuel's energy density and the amount of carbon emissions that its use results into, respectively). The new tax will be discussed in the context of the EU's efforts to meet its commitment to reduce by 20% its carbon consumption by 2020. It is expected that its introduction will alleviate the public finance-related problems that many of the EU Member States currently experience and, at the same time, lead to a wider exploitation of 'greener' fuels, in alternative to fossil ones. Currently, the taxation of energy is not harmonised at EU level, resulting in a much diversified picture among the various EU Member States. If finally agreed to, the new tax will gradually come into force in all EU Member States between 2013 and 2018 and, according to estimations, will contribute to a further 4% reduction of carbon consumption within the EU.

So far, the most successful instrument available to the EU towards reduction in carbon consumption has been the EU Emissions Trading System (hereinafter, ETS), which is based on Directive 2003/87/EC. The latter establishes a scheme for greenhouse gas emission allowance trading within the EU. Simply put, the EU ETS is a 'cap and trade' system, in the sense that it 'caps' the overall level of emissions allowed in the EU but, at the same time, gives the possibility to the operators participating in the system to trade off emission allowances. The fact that the overall level of emissions allowed in the EU is restricted creates scarcity in the market and encourages the affected industries to adopt restructuring plans and invest in environmentally-friendly technologies in an effort to become more efficient.

The main perceived weakness of the EU ETS, however, is that it does not cover significant polluters, such as the transport sector and the private households, which count for a large percentage of the overall EU emissions. This limited coverage of the scheme, together with the practice of several EU Member States to tax more heavily 'greener' fuels, such as biofuels for example, undermines the EU's climate change efforts. The new tax would, thus, enable the EU to operate a more comprehensive scheme towards the reduction of carbon consumption, by addressing the insufficiencies of the EU ETS system and by establishing a more rational and EU-wide harmonised energy-related fiscal regime.

Accurate information on the alleged measure's exact nature and content is lacking. Several reports, however, claim that its final structure will take into account the objections that a number of operators have presented against it. First, it is expected that a number of exemptions will be granted to farmers. These exemptions will possibly relate to the energy and not the carbon component of the tax. Since, according to official EU researches, agriculture is a sector responsible for a considerable percentage of the overall EU carbon emissions, it seems to be improbable that the carbon component of the tax will be avoided, as the granting of such an exemption to farmers would be contradictory to the overall efforts of the EU to reduce its carbon consumption. Moreover, specific provisions will probably be inserted in order to protect heavy EU industries, such as cement, chemicals and steel, from losing further competitiveness *vis-à-vis* their third-country rivals, who might not be subject to analogous legislative initiatives and taxation in their home countries. Finally, it is estimated that support measures for poor households will also be put in place.

If the EU Commission decides to proceed to a proposal, political agreement among EU Member States may falter on the latter's usual uneasiness towards the EU's involvement (and competence) in tax issues and to the objections of powerful lobbies that would be negatively affected by the new measure in various EU Member States. In case, however, that the difficulties are overcome, it appears that the ultimate winners of the new tax regime may be biofuels, enjoying significant fiscal advantages in comparison to fossil fuels. Consequently, it is expected that the entry into force of such a scheme may result in significant disadvantages for major producers of fossil fuels exporting their products to the EU. Depending on the measure's final structure, it might be possible for them to argue that the EU does not comply with its obligations under Article III:2 GATT (*i.e.*, national treatment in internal taxation), in that it imposes a *de facto* discriminatory internal taxation system.

The EU Parliament votes on mandatory country-of-origin labelling for certain foodstuffs

On 16 June 2009, the EU Parliament voted on a number of proposed modifications to the EU food labelling rules, *inter alia*, on the introduction of mandatory country-of-origin labelling for meat, poultry, dairy products and fresh fruits and vegetables.

In January 2008, the EU Commission had put forward a proposal for a regulation on the provision of food information to consumers. The proposal intended to merge, amend and also introduce further provisions in existing EU legislation in relation to the labelling, presentation and advertising of foodstuffs, with the aim of establishing a modernised, simplified and coherent EU scheme. In March 2010, the Committee on the Environment, Public Health and Food Safety of the EU Parliament voted in favour of the draft report prepared by the Rapporteur Renate Sommer, introducing a number of amendments to the initial EU Commission's proposal. During the recently concluded Strasbourg plenary session (14-17 June 2010), the report went through a full vote and was approved. It will now be sent to the EU Council in order to form a position on it.

One of the amendments tabled by the Committee on the Environment, Public Health and Food Safety and approved by the EU Parliament's plenary session concerns the country-of-origin labelling issue. The initial EU Commission's proposal suggested that such labelling scheme remain voluntary in principle, unless its inexistence might risk misleading consumers with regard to the true origin of the product. The EU Parliament, on the other hand, has opted for a different approach. It has introduced provisions imposing an explicit legal requirement on producers to indicate the country-of-origin of meat, poultry, dairy products, fresh fruit, vegetables and other single-ingredient products and, also, the country-of-origin of meat, poultry and fish, when the latter are used as ingredients in processed foods. Moreover, a provision already present in the EU Commission's proposal states that, in relation to meat and poultry, all of the countries of birth, rearing and slaughtering of the animals, if different, are to be mentioned on the label.

It is expected that, if such measure were to finally come into effect, some of the EU's major trading partners would be adversely affected and would seek recourse to the WTO in order to challenge it as protectionist. In particular, a requirement of mandatory country-of-origin labelling for certain foodstuffs could be attacked under the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement) and/or the WTO Agreement on Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement). The TBT Agreement would be relevant for labelling schemes that are in place for reasons other than the protection of health and life of humans, animals and plants. According to the TBT Agreement's provisions, a labelling requirement could be deemed to be WTO non-compliant in case it restricts international trade more than necessary in order to fulfil a legitimate objective. Such legitimate objectives are, *inter alia*, national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment. The question is whether a mandatory country-of-origin labelling for certain products would pass this test. The SPS Agreement, on the other hand, would come into play if the required labelling scheme is justified on grounds of protection of the health and life of humans, animals and plants. According to its provisions, for a labelling requirement to

be sustained, sufficient scientific evidence justifying the labelling scheme would need to be offered and, in addition, it would have to be demonstrated that such measure is not more trade-restrictive than necessary to achieve the selected level of sanitary or phytosanitary protection. Again, these conditions would apply even if the labelling requirement is not *de jure* or *de facto* discriminatory.

The proposed change is indicative of a recent trend within the EU Parliament to favour origin labelling. Besides the case of foodstuffs, EU Institutions are also promoting the idea of country-of-origin labelling for textiles, footwear, ceramics and furniture. The aim of such initiatives seems to be to provide accurate information to consumers in relation the quality of the products they purchase and, in addition, increase their awareness with respect to the labour and environmental conditions under which these products are manufactured. Questions, however, do arise in relation to the function of such a scheme in practice; even if a high level of consumer protection and the provision of incentives to raise regulatory standards are legitimate and desired goals, it could be that the practical implementation of the system results in prolonging the existence of uncompetitive EU producers and reinforcing stereotypes in consumers' minds, that may stand as indirect trade barriers. In an era of globalisation, when production conditions and processes vary greatly within the same country itself, it seems that country-of-origin labelling may constitute a discriminatory trade barrier, especially for companies maintaining production units in countries with different food safety, environmental and labour regulatory systems in place, which, however, proceed in adopting binding corporate social responsibility codes in order to boost development.

Indonesia requests the establishment of a WTO panel over the US clove cigarette ban

On 9 June 2010, Indonesia requested the establishment of a WTO panel to examine its claim that the US ban on clove-flavoured cigarettes violates WTO rules.

On 7 April 2010, Indonesia lodged its request for WTO consultations with the US in relation to the US '*Family Smoking Prevention Control Act of 2009*' (hereinafter, the US Act), which was signed into law on 22 June 2009. This Act includes a ban on the production and sale of all cigarettes containing natural or artificial flavour or herb or spice (*inter alia*, clove), but would permit to continue the production and sale of other flavoured cigarettes (*i.e.*, cigarettes containing menthol, which is an artificial flavour derived from mint). The purpose of the US Act is to reduce the incidence of youth smoking due to the high popularity of flavoured cigarettes to this particular age group of consumers. According to Indonesia, such ban violates a number of WTO obligations, which it had already addressed partially before the WTO Committee on Technical Barriers to Trade on 17 August 2009, but to which it claimed never to have received any reply. Consultations were held on 13 May 2010, but did not result in a mutually agreeable solution to the dispute.

In particular, Indonesia states that there is no scientific or technical information that indicates that clove cigarettes pose a greater health risk than menthol cigarettes, which are consumed in much higher quantities. Therefore, Indonesia claims that the US violates a number of obligations it has as a WTO Member. In particular, Indonesia alleges that the US measure is, *inter alia*, inconsistent with Article III:4 of the GATT, as it results in treatment that is less favourable to imported clove cigarettes than that accorded to the like domestic products (*i.e.*, menthol cigarettes). In addition, Indonesia claims that Article XX of the GATT cannot bring about any justification for such type of measures as they should only be applied to the extent necessary to protect human, animal or plant life or health without resulting in arbitrary and unjustifiable discrimination. However, as there is no scientific evidence that indicates that clove cigarettes pose a greater health risk than menthol cigarettes, Indonesia argues that the US Act is discriminatory and protective in nature.

Furthermore, Indonesia alleges that the US Act may also be violating a number of provisions included in the WTO Agreement on Technical Barriers to Trade (hereinafter, the TBT Agreement). The application of the TBT Agreement could be pertinent as the US Act is a technical regulation that covers an identifiable product, for which the composition is specified (*i.e.*, cigarettes containing a natural or artificial flavour or a herb or spice) and compliance with the US Act is mandatory.

Indonesia specifically alleges that the measure is inconsistent with Article 2.1 of the TBT Agreement as there is discrimination between clove cigarettes and menthol cigarettes, deemed to be like products. In addition, the obligations of the US under Article 2.2 of the TBT Agreement are affected as there is no scientific or technical information that indicates that clove cigarettes pose a higher health risk than menthol cigarettes or that young consumers smoke clove cigarettes in greater numbers than menthol ones, resulting in a measure that is more trade-restrictive than necessary. Moreover, Indonesia alleges that, *inter alia*, the US ban is based on the descriptive characteristics of the flavours, which is not in line with Article 2.8 of the TBT Agreement which requires that *'Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics'*. In particular, Indonesia argues that the US Act provides that the use of a natural or artificial flavour, herb or spice is prohibited when it is 'a characterising flavour' of the tobacco product or of the tobacco smoke. The concept of 'characterising flavour', which has not been further specified in the US Act, is, according to Indonesia, to be considered as descriptive. It alleges that, *inter alia*, it is unclear how a distinction can be made between certain 'ingredients' from 'characterising flavours'. Indonesia also considers that, if the arguments under the TBT Agreement were to be rejected by the WTO panel, they should alternatively be considered in relation to the WTO Agreement on Sanitary and Phytosanitary Measures.

The production of clove cigarettes is a big industry in Indonesia and such production does not exist within the US. While all clove cigarettes which are sold in the US are imported, the menthol-flavoured cigarettes are produced domestically. Reports indicate that 20% of the exports of clove cigarettes of Indonesia goes to the US. The US ban, therefore, is likely to have devastating effects for the Indonesian cigarettes industry, even in a commercial context where only 0.09% of the cigarettes sold on the US market are clove cigarettes, in contrast to 28% of them being menthol cigarettes. This case will likely dwell again on the often controversial and delicate assessment of what is to be considered 'like product' and may have considerable commercial consequences for the US and Indonesian cigarettes industry.

The EU Commission unveils the first details of plans to fundamentally reform the approval system for GMOs in the EU and its Member States

The first details of plans by the EU Commission to fundamentally reform the EU's rules on genetically modified organisms (hereinafter, GMOs) were unveiled last week. In simple terms, the EU Commission would be given greater freedom to approve new GM varieties for cultivation in return for letting EU Member States' Governments decide whether or not to permit growing them on their territories. A formal proposal has not yet been made public, but it has been promised that it will be tabled before the summer.

In March 2010, the EU Commission had announced its intention to propose by the summer new legislation permitting EU Member States to decide whether to cultivate GMOs or not. This was shortly after the EU Commission had approved the genetically-modified Amflora potato (see Trade Perspectives, Issue No. 5 of 12 March 2010). Following the political guidelines of the EU Commission President, Mr. Barroso, of September 2009, the EU Health and Consumer Policy Commissioner, Mr. Dalli, had then been asked to make a proposal by the summer setting-out how an EU authorisation system on GMOs, based on science, can be combined with freedom for EU Member States to decide whether or not they wish to cultivate GM crops on their territories (see Trade Perspectives, Issue No. 7 of 9 April 2010). The new plan seems to be the first outcome of EU Commissioner Dalli's efforts.

According to sources familiar with the draft, the EU Commission's proposal would include 'fast-track' technical guidelines, which would immediately enable EU Member States to grow or ban GM crops as they choose, and a change to current EU legislation on the release of GM organisms in the environment. Approvals of new GM varieties for growing in the EU would still be granted at EU level following a scientific safety assessment, but EU Member States would be free to ban

cultivation at any time without the need for scientific justification, and the EU Commission will not intervene.

In practise, the plan is likely to see an increase in commercial planting in EU Member States where GM technology is already been used, such as the Czech Republic, Portugal and Spain, while legally endorsing existing bans of GM varieties (based on safeguards foreseen in EU law) in EU Member States which oppose GM technology, including Austria, Italy, and Hungary.

Although only some details of the planned reform were revealed, there are already a number of complex legal questions looming in the horizon. Would such an approach comply with EU internal market rules? The plan appears to give individual EU Member States the authority to ban the cultivation of GMOs for whatever reason. Under the current system, bans must be supported by scientific evidence of health or environmental concerns. The proposal could violate the EU's internal market rules which basically state that a product that is legal in one EU Member State can be legally marketed in another EU Member State. There are limits to the free movement of goods, though. Under Article 36 (ex Article 30 TEC) of the Treaty on the functioning of the EU, free movement of goods rules (the provisions of Articles 34 and 35) '*shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States*'. There are two issues here. An EU Member State's ban of a GMO which has been assessed as safe and authorised at EU level may not be justified under the grounds listed above. And, the decision not to permit the use of a GMO may well be considered as arbitrary (although, in this case, backed by the EU Commission).

If this were to result in farmers from certain EU Member States (*i.e.*, Spain or the Czech Republic) having access to GM seeds, while those other EU Countries (*i.e.*, France or Hungary) not having such access, this could result in a competitive advantage for the Spanish or Czech farmers (or, as you wish, viewed from the perspective of GM opponents, a disadvantage for marketing reasons). In any event, the modalities of planting, growing and marketing products which also have a GM variety would importantly differ from one EU Member State to another and there would be ample margins for allegations of discriminatory and non science-based treatment with serious infringements of the free movement of goods principle.

The second question would be whether this approach would result in the EU system of GM approvals being again challenged at the WTO. This occurred before and, in the *EU – Biotech Products* dispute, the WTO had ultimately condemned an EU-level *de facto moratorium* on the approval of GM products. In fact, setting-up a system based on science and leaving, at the same time, EU Member States with the freedom to respect it or not, appears to be a difficult (if not impossible) balance to strike, particularly in light of the EU commitments and obligations under the WTO system. It appears that the 'opt out' system envisaged under the new system would permit EU Member States to establish barriers to trade as the cultivation of certain GMOs might not be *de facto* authorised in certain jurisdictions. This could even lead, once more, to a *de facto moratorium*, as certain markets within the EU would be closed, in violation of the EU's obligations under Article XI of the GATT on the general elimination of quantitative restrictions. In addition, such system could hardly be justified under the WTO Agreement on Sanitary and Phytosanitary Measures (*i.e.*, Articles 2.2, 5.1 and 5.2 thereof) since a ban on GMOs could only be justified on the basis of scientific evidence, whereas it appears that, under the new EU plan, EU Member States would have the authority to ban the cultivation of GMOs for 'whatever reason'.

Further to the legal concerns described above (*i.e.*, possible violations of the EU rules on free movement of goods and of international trade rules), if approved, the reform could lead, on one hand, to an increase of GM plantings in the EU as new GM crops would be authorised more easily at EU level, but, on the other hand, to a new form of *de facto moratorium*, since in the final instance

it would be the individual EU Member States deciding freely and autonomously whether or not to permit the GMs on their territories. It cannot be excluded that, after authorising a GM variety at EU level, a great number of EU Member States will decide not to authorise its use on their territories. This will inevitably lead to EU and WTO litigation.

Recently Adopted EU Legislation

- *Council implementing Regulation (EU) No. 510/2010 of 14 June 2010 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain cargo scanning systems originating in the People's Republic of China*

- *Council Implementing Regulation (EU) No. 511/2010 of 14 June 2010 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain molybdenum wires originating in the People's Republic of China*

- *Council Implementing Regulation (EU) No. 512/2010 of 14 June 2010 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Ukraine following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No. 1225/2009*

- *Council Implementing Regulation (EU) No. 492/2010 of 3 June 2010 imposing a definitive anti-dumping duty on imports of sodium cyclamate originating in the People's Republic of China and Indonesia following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 1225/2009*

- *Council Decision of 10 May 2010 on the signing and provisional application of the Geneva Agreement on Trade in Bananas between the European Union and Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Venezuela and of the Agreement on Trade in Bananas between the European Union and the United States of America*

- *Council Decision of 22 March 2010 on the signing, on behalf of the European Union, of a Protocol to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, on Conformity Assessment and Acceptance of Industrial Products (CAA)*