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The European Court of Justice argues that 'pure' chocolate is 'pure non-sense'

In the judgment of 25 November 2010, in Case C-47/09, European Commission v. Italian Republic, the European Court of Justice has declared that, by providing that the adjective 'pure' may be added to the sales name of chocolate products which do not contain vegetable fats other than cocoa butter, the Italian Republic has failed to fulfil its obligations under EU law (*i.e.*, Article 3(5) of Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption and Article 3(1) of that directive, read in conjunction with Article 2(1)(a) of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs). The Italian Legislative Decree No. 178 of 12 June 2003 implementing Directive 2000/36/EC provides in Article 6(1), as to the use of the phrase 'pure chocolate' that chocolate products […], which do not contain vegetable fats other than cocoa butter, with the exception of the filling where it is not made of cocoa or chocolate products, may bear on the label the word 'pure' paired with the word 'chocolate', added to or incorporated in the sales names listed in Annex I, or the phrase 'pure chocolate' elsewhere on the label.

EU labelling rules for cocoa and chocolate products set out in Directive 2000/36/EC have been established after a compromise was reached between countries like the UK or Ireland, where chocolate usually contains also other vegetable fats than cocoa, and 'traditionalists' like Belgium and Italy, where chocolate producers only use cocoa butter. It was basically agreed that there would be something on the label making clear whether it is made of pure cocoa butter or not.

In its judgment, the Court notes that the EU has fully harmonised sales names for cocoa and chocolate products in order to guarantee the single nature of the internal market. Those names are both compulsory and reserved for the products listed in the EU legislation (*i.e.*, cocoa butter, cocoa powder, chocolate, milk chocolate, family milk chocolate and white chocolate). That being so, the Court held that EU legislation makes no provision for the sales name 'pure chocolate' and does not permit its introduction by a national legislation, as in the case of Italy's norm. In its jurisprudence, the Court has already held that the addition of substitute vegetable fats (of up to 5%) to cocoa and chocolate products does not substantially alter their nature to the point where they are transformed into different products and, therefore, does not justify a difference in their sales names. It is important to emphasise that under Directive 2000/36/EC, EU legislation provides that the addition of substitute vegetable fats does not make it necessary to use different sales names for such products, but it requires the presence of additional information on the label. In the case of chocolate products to which vegetable fats other than cocoa butter have been added, Article 2 of Directive 2000/36/EC, read in the light of recital 9 in the preamble to that directive, ensures that the consumer is provided with correct, neutral and objective information on the product concerned, in addition to the list of its ingredients, through use of the phrase '*contains vegetable fats in addition to cocoa butter*'.

In simple terms, with up to 5% of other vegetable fats than cocoa butter (Directive 2000/36/EC lists palm oil and 5 other non-lauric vegetable fats, which are rich in symmetrical monounsaturated triglycerides of the type POP, POSt and StOSt), chocolate is considered in the EU as 'pure' as chocolate with 100% cocoa butter. It is a question of chocolate making traditions. Therefore, in essence, the question seems to be how consumers can be adequately informed of the total absence of vegetable fats besides cocoa butter and how different cultures of making chocolate can be reconciled in the single market.

It is now for the Italian legislator to bring its legislation in conformity with the judgment and to find, together with its chocolate producers and industry associations, a way to promote their chocolate as free from other vegetable fats than cocoa (in other words, '*pure')* in a more explicit way than just in the list of ingredients. As Italy regards the matter as a quality issue, a solution could be the introduction of an additional (and voluntary) quality label or mark for 100% cocoa-butter-chocolate, as it is done for example in Belgium. The previous solution (*i.e.*, the introduction of the sales name 'pure chocolate' by means of Legislative Decree No. 178 of 12 June 2003) will now have costly consequences for Italian producers that need to change the labelling on the relevant products. As the labels have to be amended anyway, it is recommendable that the Italian legislator finds a solution, ideally in coordination with its domestic industry, which protects and commercially enhances its chocolate sector and tradition, while respecting EU law. This can be achieved, for instance, by means of a labelling requirement that provides consumers with correct, neutral, objective, and not-misleading information.

WTO Members' notification reveal breaches of the committed levels of agricultural domestic support as new export restrictions are adopted

At the meeting of the WTO Committee on Agriculture (hereinafter, the Committee) held on 18 November 2010, WTO Members discussed certain Members' breaches of the committed levels of domestic support to agricultural products. In particular, the notifications circulated on 12 October and 1 November 2010, by, respectively, Israel and Norway, revealed these countries' breaches of their committed levels for the year 2008. Costa Rica's level of domestic support had been notified earlier and discussed at the previous Committee meeting held in September, where it was found to drastically exceed the levels allowed under WTO rules for the years 2007, 2008 and 2009. In particular, Costa Rica's notifications revealed that its domestic support for agriculture had reached USD 62.5 million in 2008 and USD 91.7 million in 2009, against a maximum committed level of USD 15.9 million.

The WTO Agreement on Agriculture (hereinafter, the AoA) requires WTO Members to limit trade-distorting domestic support (referred to as 'amber box' support) on agricultural products to the levels of the bound reduction commitments (measured in aggregate measurement of support – or AMS) specified in Section I, Part IV of their goods Schedules.

According to the reports of the meetings, the Members concerned justified some of the breaches on the basis of contingent factors, including high world prices and tighter supply, also linked to export restrictions. Costa Rica stated that its actions were triggered, *inter alia*, by domestic policies adopted to counter rising world prices. In response to other Members' questions, at the Committee meeting held on 18 November 2010, Costa Rica further explained that a high-level commission had been asked to propose reforms in the rice sector so as to bring the support within the commitment level. In the meantime, Costa Rica informed that a decision had already been taken to reduce rice support prices by 18%, which would in turn reduce production and lead to a reduction of the amount of support in 2011. Concerns with Costa Rica's breaches were expressed by Canada, the EU, Pakistan, the US and Thailand.

Norway's breach was caused by a modification of the calculation of its commitments to include rye, oilseeds and goat milk under the 'amber box' category, as a result of the observations made in the course of its trade policy review of October 2008. Norway explained that, by the time the trade policy review had been completed, it was not able to change the level of support already granted or committed in 2008 to meet its WTO commitments and clarified that the alteration did not cause breaches in other years and reforms have been put in place to bring the level of domestic support within its WTO committed levels.

When questioned by other Members, Israel suggested that its breach was partly due to exchange rate fluctuations affecting the relation between the USD – in which Israel's commitments are expressed – and the shekel (*i.e.*, Israel's currency). Israel also indicated that, if the 2006 exchange rate had been used, the figures for 2008 would not have exceeded the committed levels. Israel also blamed export restrictions imposed by Ukraine and other WTO Members for raising prices and limiting supply.

Ukraine notified the adoption of export quotas on wheat and other grains on 28 October 2010. According to Ukraine's notification, the measures, which should cease to have effect on 31 December 2010, were introduced in order to prevent a critical shortage in the domestic market resulting from a poor harvest in 2010 and to '*eliminate a significant imbalance in the domestic grain market that is essential for food security and stability of the grain market*'. WTO Members are allowed to apply export restrictions on agricultural products for reasons of food security, provided that such restrictions or prohibitions are applied temporarily and to prevent or relieve critical shortages of foodstuffs (see Article XI:2(a) of the GATT). In addition, Article 12 of the Agreement on Agriculture requires the Member instituting the export prohibitions or restrictions to give due consideration to the effects of the measure on the importing Members' food security. It also imposes specific transparency requirements and provides that additional information must be delivered upon request and that consultations shall take place, upon request, with any WTO Member having a substantial interest as an importer. At the Committee meeting, WTO Members asked Ukraine several questions in relation to its export quotas, including on the consistency of restrictions imposed with a reported export deal with Russia and questioned whether the system exempted some countries from the quotas. In fact, it appears that the non-discrimination principle under Article XIII of the GATT applies to Ukraine's export restrictions so that, in the absence of a justification specifically catered for in WTO rules, Ukraine would be precluded from applying different export regimes for different countries.

Whereas WTO Members are currently negotiating, within the Doha Development Agenda, new agricultural rules, they may seek redress for violations of the existing legal framework through the WTO dispute settlement system. In particular, WTO Members wishing to counter other countries' export restrictions should consider bringing a complaint to the WTO through the WTO dispute settlement mechanism rather than resorting to the adoption of 'retaliatory' domestic policies that may result in breaches of the current legal framework. Similarly, a dispute may be brought against violations to the rules and commitments governing domestic support.

The EU bans the chemical Bisphenol A from plastic infant feeding bottles

On 25 November 2010, the EU Standing Committee on the Food Chain and Animal Health (composed by representatives of the EU Member States) adopted with qualified majority a proposal from the European Commission on a directive to ban the chemical Bisphenol A (hereinafter, BPA) from plastic infant feeding bottles. Raising concerns about the short notice and lack of time to examine the proposal, four EU Member States, including the UK, abstained. The measure will likely enter into force in mid-2011. The measure does not

require the approval of the European Parliament, which in any case called in June 2010 for such a ban.

BPA is used as a monomer in the manufacture of polycarbonates and epoxy resins, as an antioxidant in PVC plastics and as an inhibitor of end polymerisation in PVC. Polycarbonates are used in food contact plastics such as reusable beverage bottles, infant feeding bottles, tableware (plates and mugs) and storage containers, whereas epoxy resins are used in protective linings for food and beverage cans and vats. Concerns have arisen over BPA since small amounts can potentially leach out from food containers into foodstuffs and beverages and therefore be ingested. Some studies indicated that high levels of BPA could be carcinogenic. According to Commission Directive 2002/72/EC relating to plastic materials and articles intending to come into contact with foodstuffs, BPA is currently permitted for use in food contact plastics in the EU with a specific migration limit of 0.6 mg/kg food. In 2006, the European Food Safety Authority (hereinafter, EFSA) set the TDI (Tolerable Daily Intake) for BPA at 0.05 mg BPA/kg body weight/day. Canada became in October 2010 the first country to classify BPA as a toxic substance. Bans are also in place in Australia and certain US States. Two EU Member States (*i.e.*, France and Denmark) have introduced bans on baby bottles with BPA. Danish authorities went a step further by extending the ban to all food products for children up to the age of three.

After examining the national safeguard measures of Denmark and France and the detailed grounds provided by these countries for banning BPA in certain food contact articles, the Standing Committee on the Food Chain and Animal Health adopted a draft Commission Directive amending Directive 2002/72/EC and banned of use of BPA in plastic infant feeding bottles. As to the legal base of that measure, under Article 18(2) of Regulation No. 1935/2004 on materials and articles intended to come into contact with food, the Commission shall examine, where appropriate after obtaining an opinion from the EFSA, the grounds adduced by a Member State that has (as a result of new information or a reassessment of existing information) detailed grounds for concluding that the use of a material or article endangers human health (although it complies with the relevant specific measures) and has temporarily suspended or restricted its use within its territory.

In the scientific opinion (requested by the Commission) of 23 September 2010 on BPA (*Evaluation of a study investigating its neurodevelopmental toxicity, review of recent scientific literature on its toxicity and advice on the Danish risk assessment of Bisphenol A*), EFSA's panel concluded, on the basis of the comprehensive evaluation of recent human and animal toxicity data, that '*no new study could be identified, which would call for a revision of the current TDI of 0.05 mg/kg body weight/day.'* However, the panel noted that some studies conducted on developing animals have suggested other BPA-related effects of possible toxicological relevance (in particular, biochemical changes in brain, immune-modulatory effects and enhanced susceptibility to breast tumours), but that these studies had many shortcomings. Therefore, at present the relevance of these findings to human health could not be assessed by EFSA, though should any new relevant data become available in the future, the panel would reconsider the current opinion. Finally, the panel did not consider the currently available data as convincing evidence of neurobehavioural toxicity of BPA.

EFSA's opinion has been widely interpreted as endorsing the continued use of BPA in food contact materials, as EFSA stated clearly that it had not identified any new evidence that would lead it to revise the current Tolerable Daily Intake for BPA of 0.05 mg/kg body weight set in 2006, nor had it found convincing evidence of neurobehavioural toxicity of BPA. Furthermore, the position of the UK Food Standards Agency appears to be that exposure to BPA from food contact materials does not represent a risk to consumers based on current scientific evidence.

In a somewhat different reading of the opinion, EU Commissioner Dailly now emphasises that '*in the view of the recent opinion of EFSA, I had stressed that there were areas of uncertainty, deriving from new studies, which showed that BPA might have an effect on the development, immune response or tumour promotion. The decision is good news for European parents who can be sure that as of mid-2011 plastic infant feeding bottles will not include BPA'.* Therefore, it appears that the EU has acted on grounds of precaution and introduced legislation which does not seem to be in line with the findings of the EFSA scientists that had not identified any new evidence for health concerns. An EFSA spokesman said that '*EFSA's role is to provide independent scientific advice to risk managers such as Member States and the European Commission. It is then up to the risk managers to decide whether to introduce a ban.'*

The European producers of BPA and polycarbonate appear to be deeply disturbed by the ban which, in their view, is in direct contradiction to the conclusions drawn in the assessment of BPA by EFSA. Also a WHO expert panel in Ottawa, Canada, at the beginning of November 2010, considered all the latest scientific evidence on BPA and reaffirmed that consumer exposure to low levels of BPA does not lead to accumulation and BPA is rapidly eliminated from the body, concluding that no public health measures are appropriate at this time.

From an industrial and commercial perspective, this ban appears to be also slightly anachronistic, in that the vast majority of baby bottle manufacturers in Europe seem to have already practically phased out BPA from their production process. Many manufacturers now offer BPA-free bottles which are, however, slightly more expensive than the 'old' BPA bottles. From an academic and legal point of view, however, the matter raises other questions. What are the Commission's criteria for 'rubber-stamping' certain EFSA opinions in some areas and regulatory ambits, such as health claims, while in the case of BPA different criteria, such as public opinion, appear to be also relevant if not altogether overriding scientific opinions? This margin of regulatory discretion appears to be, at best, confusing.

The EU Commission revised its preferential rules of origin for products imported under the GSP

On 18 November 2010, the EU Commission adopted Regulation No. 1063/2010, which amended the EU rules of origin for products imported under the generalised system of preference (hereinafter, GSP).

The GSP is the EU scheme for granting unilateral tariff preferences to imports from developing countries. The scheme, provided in EU Regulation No. 732/2008, includes three separate preferential regimes: the standard GSP, the 'GSP +', which is a special arrangement for sustainable development and good governance, and the 'Everything But Arms' arrangement, providing duty-free and quota-free access for all products from the 49 least developed countries (hereinafter, LDCs).

Preferential rules of origin determine which products are to benefit from the preferences in the context of preferential trade arrangements. The rules of origin that apply for GSP are currently contained in Articles 66 to 97 and Annexes 14 to 18 and 21 of EU Regulation No. 2454/93 laying down provisions for the implementation of the EU Customs Code. Under these rules, products originate in a particular beneficiary country if they are either wholly obtained in that country or sufficiently worked or processed there. Specific criteria are provided for considering a product 'wholly obtained' or 'sufficiently worked or processed'. This basic principle has been kept in the new set of rules. However, the new rules of origin, based on a communication that the EU Commission adopted in 2005, are intended to simplify the current rules and facilitate beneficiary countries' access to the preferences

offered by the GSP. *Inter alia*, the new rules factor-in the specificities of different sectors of production and processing requirements for determining whether goods have been sufficiently worked or processed. Changes concern the rules of origin of agricultural and industrial products and, in relation to the latter case, specific, more relaxed rules of origin are provided for LDCs.

Regulation No. 1063/2010 also relaxes the conditions for cumulation of origin. The current rules of origin provide for bilateral cumulation with the EU, as well as cumulation with Norway and Switzerland and for regional cumulation. In particular, they provide that materials originating in the EU, in Norway or Switzerland (with the exception of agricultural products for the latter two countries), which are further worked or processed in a beneficiary country, are considered to originate in the beneficiary country, provided that the working or processing carried out in the beneficiary country is more than the minimal (insufficient) working or processing, as listed in Article 70 of Regulation No. 2454/93, and may be exported to the EU, Norway or Switzerland under preferential treatment. The new rules extend cumulation to materials from Turkey, again with the exception of agricultural products. In addition, a new group was included in the GSP regional cumulation system, allowing regional cumulation to comprise also Members of the MERCOSUR (*i.e.*, Argentina, Brazil, Paraguay and Uruguay). Regulation No. 1063/2010 also provides for new types of regional cumulation, particularly between countries of different regions and between GSP beneficiaries and countries with which the EU enjoys Free Trade Agreements.

Lastly, the new rules also simplify the procedures for the proof of origin. In particular, the certificate of origin Form A issued by the authorities of the beneficiary countries will be replaced by a system of certification of origin with statements on origin to be submitted directly by registered exporters. The new rules of origin will enter into force on 1 January 2011.

Although they appear to ease requirements for developing countries to meet EU preferences, these new rules should be assessed against the backdrop of the recent proliferation of bilateral and regional FTAs and preferential trading arrangements (PTAs) being launched, negotiated and concluded by the EU with selected trading partners. These agreements usually contain dedicated chapters on preferential rules of origin that often confer considerable advantages through cumulation schemes. For example, the recently concluded EU-Korea FTA contained controversial cumulation rules that, in combination with duty draw-back mechanisms, provide great advantages and preferences to the Korean automotive sector. Inasmuch as similar instruments may be adopted in the context of FTA or PTA negotiations, they may result in the erosion of preferences accorded by the EU to developing countries and LDCs within its GSP scheme.

Recently Adopted EU Legislation

- *Council Implementing Regulation (EU) No 1105/2010 of 29 November 2010 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of high tenacity yarn of polyesters originating in the People's Republic of China and terminating the proceeding concerning imports of high tenacity yarn of polyesters originating in the Republic of Korea and Taiwan*

- *Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of potassium chloride originating in Belarus and Russia*

- *Commission Decision of 26 November 2010 amending Annex I to Decision 2006/766/EC as regards the title and the entry for Chile in the list of third*

countries from which imports of live, frozen or processed bivalve molluscs, echinoderms, tunicates and marine gastropods for human consumption are permitted (notified under document C(2010) 8259)

- *Notice of the impending expiry of anti-dumping measures on dead-burned (sintered) magnesia*

- *Commission Decision of 25 November 2010 authorising the placing on the market of ferrous ammonium phosphate as a novel food ingredient under Regulation (EC) No 258/97 of the European Parliament and of the Council*

- *Commission Regulation (EU) No 1085/2010 of 25 November 2010 opening and providing for the administration of certain annual tariff quotas for importing sweet potatoes, manioc, manioc starch and other products falling within CN codes 0714 90 11 and 0714 90 19 and amending Regulation (EU) No 1000/2010*

- *Commission Regulation (EU) No 1063/2010 of 18 November 2010 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code*

- *Council Implementing Regulation (EU) No 1064/2010 of 17 November 2010 terminating the partial interim review of the anti-dumping and countervailing measures applicable to imports of polyethylene terephthalate (PET) film originating in India*

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