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The EC takes steps to facilitate the use of a voluntary Eco-labelling system

On 2 April 2009, the European Parliament adopted a first reading document on the voluntary EC Eco-labelling system for environmentally friendly products (the so called 'EU flower' label) to become less bureaucratic and costly to use. The objective of the proposed Regulation, which repeals EC Regulation 1980/2000 on the EC Eco-label award scheme, is to set the original requirements for the development of the Eco-labelling criteria for any goods or services supplied for distribution, consumption or use within the EC market.

To obtain the Eco-label, products and services will have to meet the environmental criteria agreed at European level, following consultations with experts from the industry, environmental and consumer organisations, as well as trade unions. Unlike what has been proposed by the European Commission, the scope of the proposed Regulation is not restricted to processed food, fisheries and aquaculture products. However, the Commission will first examine the possibility of setting reliable environmental criteria for each of the product groups that fall under the scope of application. Whether only organic products will be eligible to receive the Eco-label award, in order to avoid consumers' confusion, is a matter which is still under consideration by the European Parliament. Under the proposed scheme, the EC Eco-label cannot be awarded to goods containing substances or preparations classified as toxic or dangerous to the environment, according to Directives 67/548/EEC or 1999/45/EC, nor to substances referred in Article 57 of the REACH Regulation (Regulation No. 1907/2006/EC).

The EC is co-funding, together with the German Government, the UNEP project, which aims at the promotion of Eco-labelling schemes in the emerging economies. The UNEP project involves Brazil, China, India, Kenya, Mexico and South Africa and different export product groups. Aiming at enabling consumers to make environmentally-friendly purchases, this project foresees that at least one paper product from Brazil, one footwear product from Mexico and Kenya, one textile product from India and one television product from China will have applied for the European Eco-label by the end of 2010. The programme also supports the establishment of a national Eco-labelling system in South Africa.

While the Eco-labelling scheme appears to be essentially voluntary in nature, the vast amount of 'governmental' discussion and regulation of its proposed scope of application, environmental criteria and award mechanisms triggers the question as to whether it's likely (negative) impact on trade will fall within the purview of the relevant WTO Agreements (surely the SPS and TBT Agreements and, possibly, the GATT and the Agreement on Agriculture). All interested parties should give adequate consideration to applicable obligations contained in these WTO instruments and evaluate their rights under the WTO system.

India has relaxed its import conditions for poultry and pig meat products

India appears to have relaxed its import conditions for poultry and pig meat products, according to the latest market access review conducted by the EC Commission in February 2009. In particular, the Commission found that there has been an improvement in the market access opportunities for EC exporters in commercially important products such as heat-treated poultry and processed and unprocessed pig meat.

Since 2004, India has adopted measures in order to restrict imports on poultry products due to the risk of Highly Pathogenic Avian Influenza (HPAI), not differentiating between the outbreak in wild and in domestic birds. The measure was also imposed to pigs and pig meat products, although the World Organisation on Animal Health (OIE), in its guidelines does not link an outbreak of the avian population to a sanitary risk in the pig population. In 2007, India also extended the application of these trade-restrictive measures to include Low Pathogenic Avian Influenza (LPAI), which, according to the international standards set by OIE, should not lead to any trade restrictions.

India claimed that the measures were introduced in order to protect animal and human health from Avian Influenza, but it never provided a risk assessment based on scientific evidence that could have justified the deviation from the international standards. Instead, it prolonged the application of its (precautionary) measures on a bi-annual basis, despite the complaints and persistent pressure by its trading partners, including the EC.

The EC has raised the issue at the WTO SPS Committee level, as well as in numerous bilateral meetings with Indian representatives, particularly after several complaints were lodged by the EC business. The EC Commission has indicated that it will continue to monitor the application of Indian legislation on imports of poultry and pig meat products in order to ensure that the import conditions are in line with the international standards, as set by the OIE, and India's WTO obligations. Affected businesses should continue engaging with their Government representatives in order to ensure that their legitimate commercial expectations are protected and duly taken into account at all levels.

EC terminated anti-dumping proceedings on imports of steel products originating from China

On 6 February 2009, the EC terminated an anti-dumping proceeding concerning imports of certain hot-dipped metallic-coated iron or steel flat-rolled products originating in China. The investigation was requested, on 30 October 2007, by EUROFER on behalf of the producers representing a major proportion of the EC industry (*i.e.*, in this particular case, more than 25% of the total EC production of the above-mentioned products). The EC proceeding was initiated on 14 December 2007.

Up to September 2008, the EC Commission had provisionally established the existence of dumping, but not that of material injury. However, no provisional anti-dumping duties were imposed. The Commission sought to verify all information deemed necessary for its definitive findings by continuing the investigation. On 11 December 2008, EUROFER formally withdrew its complaint due to 'recent market turbulence'. EUROFER did not want to pursue the case on volume-based threat of injury, since the historic data on which the original complaint has been based did not reflect the current conditions on the market.

After the withdrawal of the present complaint, the Commission examined whether there was still a Community interest to nevertheless continue with the anti-dumping proceeding against China. The Commission took the unprecedented and fundamental change in the economic conditions (due to the international financial crisis and commercial downturn) under consideration and decided to terminate the current proceeding, but to continue monitoring for

possible appearance of injurious dumping in the near future. The monitoring period is not to exceed 24 months from the publication of the termination.

EUROFER expects that the Chinese economic stimulus plan will lead to a new surge of Chinese exports. Therefore, the filing of a new complaint in the foreseeable future is possible and appears probable.

Despite EC Member States' significant progress in developing GM coexistence legislation during the last years, cultivation of GM crops remains marginal

According to a Commission report on GM coexistence published this week, the EC Member States have made significant progress formulating GM coexistence laws in recent years. Coexistence of genetically modified crops with conventional and organic agriculture refers to the choice of consumers and farmers between conventional, organic and GM crop production. In compliance with the legal obligations for labelling defined in EC legislation (*i.e.*, under Directive 2001/18/EC on the deliberate release into the environment of GMOs; Regulation No. 1829/2003 on GM food and feed; and Regulation No. 1830/2003 concerning the traceability and labelling of GMOs and the traceability of food and feed products produced from GMOs), GMOs, as well as food and feed containing, consisting of, or produced from GMOs, have to be labelled accordingly in order to guarantee an informed choice.

The possibility of adventitious presence of GM crops in non-GM crops cannot be excluded. According to Article 26a of Directive 2001/18/EC, EC Member States may take appropriate national measures on coexistence in order to avoid the unintended presence of GMOs in other products. Commission Recommendation 2003/556/EC on the guidelines for the development of national strategies and best practices to ensure the coexistence of genetically modified crops with conventional and organic farming (*i.e.*, measures to be taken during cultivation, harvest, transport, storage and processing to ensure coexistence), is intended to help EC Member States to develop national legislative or other strategies for coexistence. By February 2009, 15 out of 27 EC Member States had adopted specific legislation on coexistence (*i.e.*, AT, BE, CZ, DE, DK, FR, HU, LT, LU, LV, NL, PT, RO, SE, and SK). In some of these countries, the competence rests at regional level (*i.e.*, AT and BE), and not all regions may be covered by the legislation in place. Draft legislation of three other EC Member States (including FI and LU) has been notified to the Commission. In this respect, it is remarkable that Spain, the EC Member State with the largest GM crop cultivation (of just one type, namely GM maize MON810, which is resistant to certain pests) has not adopted regulatory measures on coexistence. The production of GM crops in Europe has expanded slightly (but is still very limited). In 2008, there were 125 million hectares of GM crops world-wide. In the EC, there were just 100,000 hectares in six EC Member States (*i.e.*, Czech Republic, Germany, Portugal, Romania, Slovakia and Spain).

The EC Commission report states that GM crops have not caused any demonstrable damage to existing non-GM farming. GM coexistence measures vary by country, in part due to regional differences in farming conditions (*i.e.*, field sizes, climatic conditions, etc.). This has not caused any problems where there are different rules on each side of a border. In relation to liability rules for potential economic damage from mixing GM and non-GM crops, each EC Member State has its own rules for compensation of economic damage under its national civil law system. However, there are differences between the general liability rules of EC Member States, which imply differences in the way that potential claims in relation to GMO admixture would be handled and resolved. In particular, under fault-based systems, proof of wrongdoing or negligence by the defendant is required, whereas under strict liability systems, the judgement does not depend upon a value judgement of the defendant's behaviour. Some EC Member States have introduced strict liability regimes, which apply specifically to damages resulting from GMO admixture. However, there have been no Court cases so far. Currently,

the European Commission does not see a need interfere with, or attempt to standardise, national civil law on this issue.

In its report, the Commission concludes that the subsidiarity-based approach on coexistence has been the right choice and it sees no need to develop further harmonisation on this matter as EC Member States' governments, rather than the EC, are considered best placed to identify the most effective and efficient GM coexistence measures, given local agricultural and climatic conditions. Where coexistence of certain crops is difficult to achieve due to local conditions, areas may be designated where only GM or non-GM varieties of a given crop can be grown. These measures should be based on voluntary decisions by all farmers in that area, so that they can choose between conventional, organic and GM.

Taken into a WTO context, this idea of a subsidiarity-based approach stands-out as a powerful alternative to the 'forced harmonisation' that is only too often 'imposed' on WTO members, particularly developing countries and newly-acceded WTO Members. While it is clear that harmonisation is a wonderful instrument of trade facilitation, it appears that it results too often in mere 'lip-service' by countries that formally adopt international standards, or base their own on existing international standards, but then fail to enforce them domestically. This does not facilitate their exports, but simply the imports from those countries whose products are in compliance with international standards. Consideration should be given to encourage other trade-facilitation approaches, such as equivalency, mutual recognition or greater 'subsidiarity', that are all both WTO compliant and likely to be more conducive to trade and reflective of developing countries' needs and limited market access opportunities.

The aftermath of the *US-Gambling* dispute: further action by the EC is anticipated

On 26 March 2009, the EC Commission has finalised a report on US internet gambling laws affecting foreign suppliers after concluding an investigation under the Trade Barriers Regulation (TBR) framework. The TBR framework gives EC industries the possibility to refer to the Commission complaints on trade barriers allegedly in place and affecting EC exports or market access opportunities. The investigation was launched on 10 March 2008, after the Remote Gambling Association, based in the UK, filed a complaint to the EC. The report is now submitted to EC Member States for comments.

According to the report, US laws on remote gambling and their enforcement against EC companies constitute a barrier to market access which has adverse effects on EC economic interests. The report concludes that EC gambling companies are discriminated against US gambling companies on the basis of the Unlawful Internet Gambling Enforcement Act (UIGEA), since US companies are allowed to freely operate online gambling on horse racing in the US, whereas EC companies are not allowed and even face legal action. Several EC companies are subject to legal proceedings by the US authorities despite their withdrawal from the market following the changes in the US regulatory framework.

This is incompatible, according to the EC, with Articles XVI and XVII of the GATS, on market access and national treatment, respectively, as well as with the US specific commitments on recreational services, which include gambling and betting services. The report finds that there have been serious adverse effects for the EC, including revenue and stock market value lost as a result of the absence of the EC companies from the US market. There is no recommendation for action in the report, but it is stated that WTO action would be justified, although the alternative of an amicable solution remains open. After the outcome of the *US-Gambling* dispute raised by Antigua and Barbuda against the US, where the US measures were found restrictive of market access by means of discriminations against foreign suppliers

of internet gambling services, the US has considered re-negotiating and modifying its schedule of specific commitments within the category of 'recreational services'.

The discriminatory behaviour of the US authorities towards foreign companies (including EC operators) appears to be ongoing. On 7 April 2009, PartyGaming, the online poker and casino operator, agreed to pay a penalty of $ 105 million as part of a non-prosecution agreement with the US Attorney's Office for the Southern District of New York. PartyGaming has admitted that it was violating US laws on the prohibition of online gambling and it will, therefore, no longer be prosecuted. An important drift between domestic US legislation and enforcement proceedings on one side, and international (*i.e.*, WTO) obligations on the other, seems to continue to exist. This is clearly a matter of commercial confusion and legal uncertainly, which not only discriminates *vis-à-vis* foreign operators, but also impairs world trade. Foreign operators, even those not present in the US market, should coordinate with their Governments and demand a speedy resolution (if need be, by means of WTO dispute settlement) or compensation negotiations.

Recently Adopted EC Legislation and Documents:

Notice of initiation of 8 April 2009 of an anti-dumping proceeding concerning imports of certain molybdenum wires originating in the People's Republic of China
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:084:0005:0009:EN:PDF

Commission Regulation (EC) No 278/2009 of 6 April 2009 implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for no-load condition electric power consumption and average active efficiency of external power supplies
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0003:0010:EN:PDF

Report from the Commission to the Council and the European Parliament of 2 April 2009 on the coexistence of genetically modified crops with conventional and organic farming, COM(2009) 153 final
http://ec.europa.eu/agriculture/coexistence/com2009_153_en.pdf

Commission Regulation (EC) No 274/2009 of 2 April 2009 fixing the quantitative limit for the exports of out-of-quota sugar and isoglucose until the end of the 2009/2010 marketing year
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:091:0016:0017:EN:PDF

Commission Regulation (EC) No 268/2009 of 1 April 2009 amending Regulation (EC) No 264/2009 fixing the import duties in the cereals sector applicable from 1 April 2009
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:090:0006:0008:EN:PDF

Commission Decision of 12 March 2009 establishing the revised ecological criteria for the award of the Community Eco-label to televisions (notified under document number C(2009) 1830)
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:082:0003:0008:EN:PDF