

The EU bans illegal timber and timber products

On 16 June 2010, the EU Parliament and the EU Council reached an agreement on the ban of illegally-logged or illegally-sourced timber as of 2012.

The proposal for the '*Regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market*' was issued by the EU Commission in October 2008. Illegal logging is defined as the harvest, processing or trading of timber in violation of national laws applicable in the country of harvest. Illegally-sourced timber is brought on the market due to high demand for timber and/or weak national rules that condemn such practices. The main objective of the proposal was to complement and underpin the EU's policy framework on '*Forest Law Enforcement, Governance and Trade*' (hereinafter, FLEGT) and support the international fight against illegal logging and its related trade. The EU FLEGT Action Plan sets out a number of objectives, which include support for timber producing countries, efforts to develop multilateral cooperation to combat the trade in illegally-harvested timber, private sector initiatives as well as measures to avoid investment in activities which encourage illegal logging and conflict timber. Part of the EU FLEGT Action Plan was the adoption of the FLEGT Regulation in 2005, which established a legal framework of licences for timber imports into the EU originating in partner countries. In particular, this regulation allowed for negotiations to be launched with timber producing countries and regional organisations which expressed an interest in entering in Voluntary Partnership Agreements (*i.e.*, FLEGT VPAs) with the EU. If a country signs a VPA with the EU, imports into the EU of timber and timber products exported from that partner country are prohibited unless the shipment is covered by a FLEGT licence. VPAs have been signed and are in place with Congo-Brazzaville, Cameroon and Ghana. More VPAs are currently under negotiation.

The new EU regulation will impose a number of obligations on operators who place for the first time timber and timber products on the EU market in order to minimise the risk of allowing illegally-harvested timber or timber products derived from such timber to enter into the EU. In particular, a due diligence system is put in place for operators to follow for their exports to the EU. This due diligence system has three phases. First, such system has to contain measures and procedures that provide access to information concerning the properties of the wood, the country of harvest, the quantity, the name and address of the supplier and documents demonstrating the compliance with national legislation of the timber and timber products. Through this required information, the legal origin of the timber and timber products would be ensured. Secondly, risk assessment procedures are to be instituted, which enable the operator to analyse the risk of the products coming from illegal sources on the basis of the information acquired in the previous phase and, additionally, other relevant risk assessment criteria. Such risk assessment criteria include the assurance of compliance with national legislation, prevalence of illegal harvesting of specific tree species, prevalence of illegal harvesting or practices in the country of harvest and/or sub-region, and the complexity of the supply chain of timber products. Finally, on the basis of this risk assessment, the identified risks are to be mitigated through, *inter alia*, the requirement of additional information or documents and/or third party verification. This entire framework aims at promoting the traceability of the timber and timber products throughout the entire supply chain.

This future EU regulation may have certain profiles of inconsistency with the WTO system. In particular, it could be argued that, as it bans certain timber/timber products on the EU market, it violates Article XI of the GATT concerning the elimination of quantitative restrictions. However, the

EU would likely counter argue that such ban is justified under the terms of Article XX(g) of the GATT, as such measures relate to the conservation of exhaustible natural resources. In addition, the EU could maintain that such measures are also allowed under Article XX(b) of the GATT, as they are necessary to protect human, animal or plant life or health. At the same time, however, the argument could be made that the EU regulation is challengeable on the basis of the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement), as the regulation creates unnecessary obstacles to trade by imposing heavy burdens on the operators, in order to ensure the traceability and legality of the timber/timber products. In line with the Appellate Body in *EC – Asbestos*, the future EU regulation could also be considered as a technical regulation on the basis of the definition included in Annex 1.1 of the TBT Agreement, since the regulation lays down the characteristics of an identifiable product or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. In this case, the EU could argue that such measures are nevertheless justified, as they are created with the aim of protecting human health or safety, animal and plant life or health and the environment.

Illegal logging happens on a large scale. In fact, reports indicate that, in many countries, illegal logging is similar in size, or even higher, than legal logging activities. It poses a significant threat to forests as it contributes to the process of deforestation, which is responsible for about 20% of CO2 emissions. It also poses a significant threat to biodiversity and undermines sustainable forest management and development, including the commercial viability of operators acting in accordance with applicable legislation. However, it could be considered that the EU regulation, whereas noble in its objective, may impose requirements too burdensome and not proportional to the objectives sought. Therefore, their WTO compatibility may be questioned. The EU Parliament is to formally endorse the text of the future regulation. Reports indicate that such endorsement will most probably occur in July 2010. Subsequently, the EU Council will also have to give its approval. The regulation is to enter into force in 2012.

EU Parliament's INTA Committee votes on the proposed EU regulation implementing the safeguard clause of the EU-Korea FTA

On 23 June 2010, the International Trade Committee of the EU Parliament (hereinafter, INTA Committee) voted at first reading on the EU Commission's proposal for an EU regulation implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement (hereinafter, FTA).

On 23 April 2007, the EU Commission was authorised by the EU Council to open negotiations with a view to conclude an FTA with the Republic of Korea. While the agreement was initialled on 15 October 2009, its entry into force is still pending, as the agreement requires first to be submitted to the EU Parliament for its consent. In the meantime, however, the EU Commission has started drafting the internal EU legislation, necessary to implement some of the FTA's provisions. The early initiation of the internal EU legislative procedures is an indispensable corollary to the introduction of the, sometimes lengthy, co-decision procedure in the field of the EU Common Commercial Policy.

One of the FTA's provisions in need for implementing measures in the EU sphere is the bilateral safeguard clause, to be found in section A of chapter 3 of the FTA. According to this clause, the Parties to the agreement may suspend further reductions of the customs duty rate of a product, or increase to a certain extent the customs duty rate of a product should the liberalisation of trade between them lead to a situation of import surges, causing or threatening to cause serious injury to their relevant domestic industries. Despite the quite detailed character of the bilateral safeguard clause found in the FTA, it is necessary for the EU to also adopt internal legislation, in order to further detail certain procedural aspects, such as the initiation of the safeguard investigation or the rights of the parties involved.

The INTA Committee of the EU Parliament introduced a number of changes to the EU Commission proposal. *Inter alia*, it accorded the power to initiate an investigation not only to EU Member States and the EU Commission, but also to the EU Parliament, the Domestic Advisory Group and any legal person or association without a legal personality, representing a minimum of 25% of the relevant EU industry. The EU Parliament introduced a clause permitting the regional application of safeguard measures in exceptional circumstances; it also stressed the need for the EU Commission to take into account a number of relevant factors when making an injury determination (e.g. stocks, prices, cash flow, etc.). Finally, it included a provision on the establishment of a monitoring mechanism, focusing especially on the products that could be affected by the application of the Duty Drawback system (hereinafter, DDB system).

The bilateral safeguard clause and the internal EU implementing measures appear to be of the utmost importance for those EU industries that are negatively affected by the FTA (*i.e.*, primarily, the EU medium and small-sized car industry). Automotives constitute a key export product of Korea, with 73% of the total domestic Korean production destined for export. In 2007, imports of Korean cars to the EU accounted for 20% of all EU car imports. Due to these already high figures, concerns have been voiced that the further liberalisation of the Parties' bilateral trade will prove to have a significant impact on the EU industry (already weakened by the current economic crisis), especially for the category of small to medium-sized cars. In this respect, particular unease is being caused by two of the FTA's provisions: first, the increase of the acceptable foreign content level from 40% to 45% for the granting of preferential treatment; and, second, the application of the DDB system (*i.e.*, the refunding of duties paid on the importation into Korea of parts and components of the final product upon the latter's exportation).

EU Commission withdraws proposal for rules on organic wine production

Due to lack of agreement between the EU Commission and the EU Member States, in the meeting of the Standing Committee on Organic Farming (hereinafter, SCOF) held on 16-17 June 2010, the EU Commission withdrew a proposal for an EU Commission Regulation amending Regulation (EC) No. 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No. 834/2007 on organic production and labelling of organic products, as regards detailed rules on organic wine. The proposal withdrawn was for an EU Commission Regulation, to be adopted in the SCOF through the Comitology procedure with the representatives of the EU Member States, with the input of the Advisory Committee on Organic Farming (where the different stakeholders are present), whereby the EU Parliament is not involved in the legislative procedure.

Organic wine production was placed within the scope of EU organic farming rules by Regulation (EC) No. 834/2007 repealing Regulation (EEC) No. 2092/91, which states that a general EU framework of organic production rules should be established with regard to the production of processed food, including wine, and that the EU Commission should authorise the use of products and substances and decide on methods to be used in organic farming and in the processing of organic food. For a number of reasons, the establishment of a legal framework for organic production of wine has failed up to now. First, there were general discrepancies on whether rules on organic wine should be included in the EU Common Market Organisation of Wine (a solution preferred by most players of the traditional wine sector) or in the EU rules on organic farming (in accordance with the opinion of the majority of organic producers). Second, there is no compromise so far on which production methods and additives may be permitted in the production of organic wine. The result is that, currently, wine may not be labelled in the EU as 'organic wine', but just as 'wine from organically grown grapes'.

According to the withdrawn EU Commission proposal, the processing of organic wine requires the use of certain products and substances as additives or processing aids under well-defined conditions. For that purpose and on the basis of the recommendations of the EU-wide study on 'Organic viticulture and winemaking: development of environment and consumer friendly technologies for organic wine quality improvement and scientifically based legislative framework'

(hereinafter, 'ORWINE'), such products and substances should be allowed according to Article 21 of the Organic Farming Regulation (EC) No. 834/2007, which establishes criteria for certain products and substances in processing.

Organic wine is a growing segment of the market. According to ORWINE, in 2006, Italy was producing organic grapes on 34,000 ha, France on 19,000 ha, Spain on 16,000 ha, Germany on 2,800 ha and Austria on 2,500 ha. While the market for the first three countries is mainly export-oriented, in relation to Germany, Switzerland and Austria the market is almost exclusively domestic. In 2009, organic vineyards were expanding in all countries, especially in Austria, Bulgaria, the Czech Republic, France, Germany, Hungary and, Spain, with increasing export potential.

Why was there no agreement to establish common rules for organic wine production? There seems to be a basic agreement on a positive list of allowed techniques in the production of organic wines, as set out in the withdrawn EU Commission's proposal. However, in relation to the use of additives, no broad agreement could be reached. This is largely due to the impossibility of finding a common ground on the use and maximum level of sulphites used as preservatives. The question on sulphites is not an easy one since the level which is needed depends very much on the type of wine, the year, weather conditions and the region. Therefore, ORWINE concluded in its report that, while "scientific research demonstrates that it is not possible to produce 'good' organic wine without any addition of sulphites in a significant range of areas, wine types and years", "a majority of producers supports a reduction of sulphur dioxide use in organic wines". The EU Commission, which wanted to establish a lower limit on sulphite levels than for traditional wines (*i.e.*, 100 mg/l for red wine and 150 mg/l for white wine, instead of 150 and 200, respectively, for traditional wines, according to Commission Regulation (EC) No. 606/2009 laying down certain detailed rules for implementing Council Regulation (EC) No. 479/2008 as regards the categories of grapevine products, oenological practices and the applicable restrictions), faced opposition from a number of EU Member States. It should be noted that in the US, according to the National Organic Programme (NOP), wines to which sulphites have been added cannot be labelled as 'organic wines'.

At international regulatory level, the Codex Alimentarius Guidelines for organically produced food (GL 32-1999, last amended in 2008 and 2009) have included, in the meantime, sulphur dioxide in table 3 of Annex 2 (3.1 Additives permitted for use under specified conditions in certain organic food categories or individual food items) as permitted in cider and perry, grape wines and wines (other than grapes). However, this has been done without establishing a 'level of use' or, more in general, without setting out more specific rules as regards the production of organic wine.

The fact that organic wine cannot be labelled as such in the EU market could have trade consequences within the WTO. In fact, because no new EU regulation was agreed on, the provisions of Regulation (EC) No. 834/2007 remain applicable. Article 23 of this regulation, concerning the use of terms referring to organic production for the purposes of labelling, sets out two requirements: (i) the label may refer to the product, ingredients or feed materials as produced according to the regulation's terms; and (ii) information in the label may not be misleading for consumers. With regard to wine, only the grapes are produced in conformity with the terms of the EU regulation and, therefore, the label can only refer to the organically produced grapes, not to the wine as an organic end-product, as requirements for organic wine have not been established. Consequently, referring to the wine as 'organic' may mislead consumers. Some commentators have argued that, through such requirements, the EU is violating its obligations under the WTO Agreement on Technical Barriers to Trade (TBT Agreement). In particular, the EU measures, banning the sale of wine labelled as 'organic', could be seen as creating unnecessary obstacles to international trade, which are not drawn up for any of the objectives of national security, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health or the environment, as provided by Article 2.2 of the TBT Agreement. Although such list is not exhaustive, these are clear regulatory objectives, which do not appear to be at the basis of the

EU's considerations. Organic wine producers, which label their wine as such, may, therefore, encounter unjustifiable difficulties in entering into the EU market.

The question is what will happen next? The EU Commission is expected to circulate a modified proposal, trying to swiftly resume discussions and establish consensus among the EU Member States. What seems to be clear is that the basic principles of organic farming will not be compromised. There is growing demand for organic wines. There appear to be several private standards for the development of organic wine. A regulation at EU level, together with the new organic EU logo, would have provided organic wine producers with an important new marketing tool and would result in clear value addition. EU producers of organic wine may export their wine labelled as 'organic wine', but without the legal framework in place, they cannot label and advertise their wine in the domestic EU market as 'organic'. Finally, from an international trade perspective, the fact that organic wine producers from (*inter alia*), Australia, South Africa, South America and/or the US cannot currently legally label their wine in the EU as 'organic wine' may also trigger commercial disputes.

Brazil and the US agree on a framework for further negotiations in the wake of the cotton dispute

On 17 June 2010, the Council of Ministers of the Chamber of Foreign Commerce of Brazil (hereinafter, CAMEX) has approved the agreement reached between Brazil and the US in the wake of the cotton dispute. This decision builds upon a Memorandum of Understanding, concluded between the two parties in April 2010, which establishes a fund for technical assistance and capacity building related to the cotton sector in Brazil.

The *US – Cotton* dispute before the WTO has been ongoing for a long time. On two occasions (in 2005 and 2008), the WTO considered that certain agricultural support payments and guarantees provided by the US to its domestic producers are inconsistent with its WTO commitments. In particular, the payments to cotton producers under the marketing loan and countercyclical programmes and the export credit guarantees under the GSM-102 programme were found to be violating certain provisions of the WTO Agreement on Agriculture and the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, the SCM Agreement). As the US failed to comply with the recommendations and rulings of the WTO Dispute Settlement Body, Brazil turned to WTO arbitration procedures. On 31 August 2009, a WTO arbitrator issued two awards giving Brazil the permission to suspend concessions and other obligations vis-à-vis the US. On the basis of such awards, Brazil is allowed to apply countermeasures on goods imported from the US. In addition, in the event that the amount of total annual sanctions, as calculated by the arbitrator, were to exceed a certain threshold determined by the arbitrator and updated every year, Brazil also has the authorisation to impose cross-agreement countermeasures on US services and US intellectual property rights (see Trade Perspectives, Issue No. 17 of 18 September 2009). On 9 November 2009, CAMEX published Resolution No. 74, containing the preliminary '*List of Imported Goods Subject to Increased Duty Rates*' of products originating in the US, on the basis of which they could be subjected to retaliatory duties as high as 100% (see Trade Perspectives, Issue No. 22 of 27 November 2009). In addition, on 15 March 2010, CAMEX issued its preliminary list detailing the 'retaliation' on US intellectual property rights (see Trade Perspectives, Issue No. 6 of 26 March 2010).

The current agreement, which has been approved by CAMEX, is based on the Memorandum of Understanding reached between Brazil and the US in April 2010. This agreement creates a framework for *the US - Cotton* dispute, which entails a number of consequences. First, Brazil will not introduce any measure of retaliation and cross-retaliation, for which it had received authorisation by the WTO Dispute Settlement Body, until 2012. In exchange, until 2012, negotiations, consultations and revisions of the text of the US agricultural legislation will continuously be done in order to arrive to a new agricultural legislation that has the agreement of both parties. During the negotiations, expenditures and subsidies for the cotton sector in the US

may still continue. However, there will be a maximum limit, which is subject to the approval of the US Congress. This maximum limit is to be less than the average provided between 1999 and 2005. It has been understood as well that, during the negotiations, Brazil would receive more than 147 million USD in order to provide technical assistance and capacity building to the Brazilian cotton industry.

In addition, on 16 April 2010, the US proposed an amendment to a number of regulations governing the importation of certain animals and animal products concerning the '*changes in disease status of the Brazilian State of Santa Catarina with regard to certain ruminant and swine diseases*' (i.e., foot-and-mouth disease, rinderpest, classical swine fever, African swine fever and swine vesicular disease). Such change in status would be based on the World Organisation for Animal Health's Guidelines. As part of the deal, a risk evaluation should be completed and appropriate risk mitigation measures to determine whether fresh Brazilian beef could be imported into the US, while preventing the introduction of certain ruminant and swine diseases, should be identified.

If the US does not comply with the provisions of this agreement, Brazil can pursue its authorisation again to retaliate against the US, as was provided by the WTO arbitrator on 31 August 2009. Brazil is an important trading partner for the US. In particular, Brazil is the 10 largest trading partner of the US. If the US does not comply with the provisions of the framework agreement as set out above, the repercussions could be significant for the US economy. The value of the authorised retaliation and cross-retaliation is the second largest ever awarded in WTO history.

Recently Adopted EU Legislation

- *Council Implementing Regulation (EU) No. 579/2010 of 29 June 2010 amending Regulation (EC) No. 367/2006 imposing a definitive countervailing duty on imports of polyethylene terephthalate (PET) film originating in India*
- *Council Implementing Regulation (EU) No. 580/2010 of 29 June 2010 amending Regulation (EC) No. 452/2007 imposing a definitive anti-dumping duty on imports of ironing boards originating, inter alia, in Ukraine*
- *Commission Regulation (EU) No. 560/2010 of 25 June 2010 entering a name in the register of protected designations of origin and protected geographical indications (Farine de blé noir de Bretagne/Farine de blé noir de Bretagne — Gwinizh du Breizh (PGI))*
- *Commission Regulation (EU) No. 558/2010 of 24 June 2010 amending Annex III to Regulation (EC) No. 853/2004 of the European Parliament and of the Council laying down specific hygiene rules for food of animal origin*
- *Commission Regulation (EU) No. 543/2010 of 21 June 2010 entering a name in the register of protected designations of origin and protected geographical indications (Azeite Campo de Montiel (PDO))*
- *Commission Regulation (EU) No. 530/2010 of 18 June 2010 entering a name in the register of protected designations of origin and protected geographical indications (Gyulai kolbász/Gyulai pároskolbász (PGI))*
- *Commission Regulation (EU) No. 531/2010 of 18 June 2010 entering a name in the register of protected designations of origin and protected geographical indications (Csabai kolbász/Csabai vastagkolbász (PGI))*
- *Council Decision of 3 June 2010 on the signing, on behalf of the European Union, and provisional application of the Understanding between the European Union and the Republic of Chile concerning the conservation of swordfish stocks in the South-Eastern Pacific Ocean*

FratiniVergano specializes in European and international law, notably WTO and EU trade law, EU agricultural and food law, EU competition and internal market law, EU regulation and public affairs. For more information, please contact us at:

FRATINVERGANO
EUROPEAN LAWYERS

Rue de Haerne 42, B-1040 Brussels, Belgium Tel.: +32 2 648 21 61 - Fax: +32 2 646 02 70
www.FratiniVergano.eu

Trade Perspectives® is issued with the purpose of informing on new developments in international trade and stimulating reflections on the legal and commercial issues involved. Trade Perspectives® does not constitute legal advice and is not, therefore, intended to be relied on or create any client/lawyer relationship.

To stop receiving Trade Perspectives® or for new recipients to be added to our circulation list, please contact us at:

TradePerspectives@FratiniVergano.eu