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RUSSIAN FEDERATION – MEASURES ON THE IMPORTATION OF LIVE PIGS, PORK AND OTHER PIG PRODUCTS FROM THE EUROPEAN UNION

REQUEST FOR CONSULTATIONS BY THE EUROPEAN UNION

The following communication, dated 8 April 2014, from the delegation of the European Union to the delegation of the Russian Federation and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of the Russian Federation (Russia) pursuant to Articles 1 and 4 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), concerning certain measures adopted by Russia affecting the importation of live pigs and their genetic material, pork, pork products and certain other commodities (the products at issue) from the European Union (the EU), purportedly because of concerns related to isolated cases of African Swine Fever (ASF).

Background to the dispute and the SPS measures at issue

Following two cases of ASF in wild boar in the south-eastern part of Lithuania on 24 January 2014, Russia ceased accepting certain of the products at issue from the entire EU as of 27 January 2014. Two more cases in wild boar were reported in the eastern region of Poland on 17 and 19 February 2014. The Russian measures, amounting to the adoption, maintenance and/or application of an import ban or import restrictions, are evidenced, *inter alia*, by the following.

On 29 January 2014, two administrative notices from the Russian Federal Service for Veterinary and Phytosanitary Surveillance were issued (FS-SA-7/1275 and FS-SA-8/1277).

According to Russia's notification to the WTO, G/SPS/N/RUS/48 of 10 February 2014, Russia imposed, on 25 January 2014, emergency measures with regard to Lithuania, comprising a temporary restriction on imports of "live pigs and their genetic material, pork products (which were not heat treated to at least 72ºC for at least 30 minutes), including products from slaughter of wild boar, horn-hoofed and leather, intestinal materials, bristles, feed for pigs, hunting trophies, previously used equipment for maintenance, transportation, slaughter and cutting of pigs" (FS-EN-8/1023). The EU reacted to the measures imposed by Russia with a communication to all WTO Members of 19 February 2014 on Lithuania (G/SPS/GEN/1305).

According to Russia's second notification to the WTO G/SPS/N/RUS/49 of 4 March 2014, Russia imposed on 27 February 2014 similar emergency measures with regard to Poland (FS-NV-8/2972). The EU also reacted to the measures imposed by Russia with a second communication to all WTO Members of 11 March 2014 on Poland (G/SPS/GEN/1313).

On 14 March 2014, Russia followed its WTO notifications and the two EU communications to all members, by a communication of its own to all WTO members (G/SPS/GEN/1315).

Immediately after the occurrence of the four ASF cases, the EU introduced measures, which were complemented by national measures by Lithuania and Poland, establishing affected areas to

prevent any spread of ASF from those areas, in line with EU law and international standards laid down by the World Organisation for Animal Health (OIE). Russia was informed about all measures taken and participated in expert meetings.

The competent Russian authorities have attempted to justify the refusal of imports from the EU territory, *inter alia*, based on the assertion that the wording of the veterinary export certificates for the export of the products at issue from the EU to Russia no longer allows for correct certification of exports from the non-affected areas of the EU, given the four ASF cases in Lithuania and Poland. The EU authorities had promptly provided the Russian authorities with all requested relevant information. Additional information was also provided on the EU's own initiative. Furthermore, a series of bilateral meetings were held between the EU authorities and the Russian authorities during February and March 2014, at which further information and explanations were provided. Notwithstanding the information and explanations provided, Russia has refused to recognise the steps the EU has taken to separate the affected areas (regionalisation) and has maintained its measures preventing the resumption of exports to Russia from non-affected areas in the EU, and from Lithuania and Poland.

On 8 January 2014, Ukraine notified cases of ASF in wild boar in the Forester-hunting ground "Pischane", Stanychno-Luganskyi, in the Luhansk Region, close to the Russian border. Russia restricted imports of live pigs and pork products from this region only, according to the administrative notice from the Russian Federal Service for Veterinary and Phytosanitary Surveillance of 15 January 2014 (FS-NW-8/528). This decision – detailed in Russia's notification to the WTO G/SPS/N/RUS/46 – was issued merely days before the isolated cases of ASF in Lithuania.

In the same vein, Russia accepted lifting certain import restrictions against Belarus despite the fact that ASF has been identified and notified in two regions of Belarus since June 2013. The movement of live pigs and pork products from pig farms and meat processing companies of the Mogilev Oblast, Belarus, was allowed by virtue of the administrative notice from the Russian Federal Service for Veterinary and Phytosanitary Surveillance of 27 January 2014 (FS-EN-8/1093).

Following steps by the EU to initiate consultations in the WTO, on 2 April 2014, the Russian authorities announced that, as from 7 April 2014, temporary restrictions will be introduced, and that the ban will be extended to include processed products containing pork excluding ready-to-use feed for cats and dogs which underwent thermal treatment (temperature not lower than 70ºC, duration of treatment not less than 20 minutes), from Lithuania and Poland (FS-EN-8/5084). This announcement was followed closely by updates to the original Russian notifications (G/SPS/N/RUS/48/Add.2 and G/SPS/N/RUS/49/Add.1) to demonstrate the extension of the ban already in force. They include an administrative notice from the Russian Federal Service for Veterinary and Phytosanitary Surveillance (ref. FS-EN-8/5081).

The measures at issue include the adoption, maintenance and application by Russia, through its actions or omissions, in law and in fact, of import bans or import restrictions on live pigs and their genetic material, pork, pork products and certain other commodities, including those referred to above (the products at issue[1]), as such and as applied, from the EU or any part thereof (with the exception of the areas[2] where protective measures against ASF apply in accordance with EU legislation). The measures at issue also include discriminatory treatment afforded to the EU and its Member States by comparison with Ukraine and Belarus. Furthermore, the measures at issue include those as of 7 April 2014 with respect to Lithuania and Poland, and eventually the EU.

The measures at issue appear to be inconsistent with Russia's obligations under the SPS Agreement and the GATT 1994.

Article 2.2 of the SPS Agreement

It appears that Russia has not ensured, and does not ensure, that the measures at issue are applied only to the extent necessary to protect human or animal life or health. It does not appear necessary for Russia to restrict imports from non-affected areas of the EU; or with respect to all the products at issue.

[1] The products at issue are the products to which the Russian measures apply.
[2] Sardinia and certain areas in south-eastern Lithuania and north-eastern Poland, bordering Belarus.

It appears that Russia has not ensured, and does not ensure, that the measures at issue are based on scientific principles. It appears that there is no scientific basis, whether specific or general, for restricting imports from non-affected areas of the EU; or with respect to all the products at issue.

It appears that Russia has not ensured, and does not ensure, that the measures at issue are not maintained without sufficient scientific evidence.

Articles 3.1, 3.2 and 3.3 of the SPS Agreement

The measures appear neither to be "based on" nor "to conform" to the relevant international standards, guidelines or recommendations, as provided for in Articles 3.1 and 3.2 of the SPS Agreement. Furthermore, they do not appear to be consistent with Article 3.3 of the SPS Agreement as there does not appear to be any scientific justification for departing from the relevant standards, guidelines or recommendations, nor would the measures at issue appear to be a consequence of the level of sanitary protection sought by Russia.

Articles 5.1 and 5.2 of the SPS Agreement

It appears that Russia does not ensure that the measures at issue are based on an assessment, as appropriate to the circumstances, of the risks to human or animal life or health, taking into account risk assessment techniques developed by the relevant international organizations, as required by Article 5.1 of the SPS Agreement. Russia has neither provided, nor referred to, any such risk assessment.

It appears that, in adopting, maintaining and/or applying the measures at issue, Russia did not and does not take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; the prevalence of specific diseases or pests; the existence of pest- or disease-free areas; the relevant ecological and environmental conditions; and quarantine or other treatment. Russia has provided no evidence that it has taken these matters into account, as required by Article 5.2 of the SPS Agreement. Had Russia properly taken these matters into account, it would have concluded that the measures at issue are unnecessary and unjustified.

Article 5.7 of the SPS Agreement

As regards the measures at issue relating to Lithuania and Poland only, Russia appears to rely on Article 5.7 of the SPS Agreement for the justification of its measures, as indicated in its communication to all WTO members of 14 March 2014 (G/SPS/GEN/1315).

With respect to the measures at issue, it appears that Russia has failed to comply with any of the requirements of Article 5.7 of the SPS Agreement. In this case, it appears incorrect to proceed on the basis that relevant scientific evidence is insufficient. The measures at issue do not appear to be provisional. Russia does not appear to have proceeded on the basis of available pertinent information, including that from the relevant international organizations, as well as from sanitary measures applied by other Members. Although, Russia has obtained the information necessary for a more objective assessment of risk, it has not, and shows no sign of, reviewing the sanitary measure accordingly within a reasonable period of time.

Articles 6.1, 6.2 and 6.3 of the SPS Agreement

It appears that Russia has not ensured, and does not ensure, that the measures at issue are adapted to the sanitary characteristics of the area from which the products at issue originate and to which they are destined, as required by Article 6.1 of the SPS Agreement. It appears that, in assessing the sanitary characteristics of the affected area, Russia fails to take into account, *inter alia*, the level of prevalence of ASF (four incidences in feral pigs (wild boar) in geographically limited areas close to the eastern external border of the EU), the existence of eradication and control programs (immediately implemented in accordance with international standards laid down by the OIE), and appropriate criteria or guidelines developed by the relevant international organizations.

It appears that, with respect to the measures at issue, Russia does not recognise the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, as required by Article 6.2

of the SPS Agreement. It further appears that, in the measures at issue, Russia does not make determinations with respect to such areas based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary controls. Russia fails to recognise the EU territory, excluding the restricted areas, as a non-affected area, despite the implementation of appropriate regionalisation measures.

With respect to Article 6.3 of the SPS Agreement, the EU considers that it has provided the necessary evidence to objectively demonstrate to Russia that the EU (excluding Sardinia and parts of Lithuania and Poland which have been restricted due to the presence of ASF) is a disease-free area or area of low ASF prevalence. For this purpose, access has been given, upon request, to Russia for inspection, testing and other relevant procedures.

Articles 5.3, 5.4 and 5.6 of the SPS Agreement

It appears that, in assessing the risk to animal health and determining the measure to be applied for achieving the appropriate level of sanitary protection, Russia has failed to take into account all relevant economic factors referred to in Article 5.3 of the SPS Agreement, including the relative cost-effectiveness of alternative approaches to limiting risks.

It appears that, when determining the appropriate level of sanitary protection, Russia has failed to take into account, or properly take into account, the objective of minimizing negative trade effects, as required by Article 5.4 of the SPS Agreement.

It appears that, when establishing and maintaining the measures at issue, Russia fails to ensure that they are not more trade-restrictive than required to achieve their appropriate level of sanitary protection, taking into account technical and economic feasibility, as required by Article 5.6 of the SPS Agreement. Russia fails to take into account that there are other measures, which are reasonably available taking into account technical and economic feasibility, that achieve Russia's appropriate level of sanitary protection and that are significantly less restrictive to trade.

The alternative measures would be those that take into account the principles of regionalisation, as determined in the OIE Terrestrial Code on Zoning and Compartmentalisation (Chapter 4.3) and set out in Article 6 of the SPS Agreement. Russia should recognise the EU territory (excluding the restricted areas due to the presence of ASF), as a non-affected area. The alternative measures would also involve a narrower definition of the products at issue.

Article 2.3 and Article 5.5 of the SPS Agreement

It appears that Russia does not ensure that the measures at issue do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members, as required by Article 2.3 of the SPS Agreement. It further appears that Russia is applying the measures at issue in a manner that constitutes a disguised restriction on international trade. In addition, it appears that Russia has failed to avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, and that such distinctions result in discrimination or a disguised restriction on international trade, contrary to the requirements of Article 5.5 of the SPS Agreement.

By refusing to accept regionalisation with regard to the territory of the EU and its Member States (including the non-affected areas in Lithuania and Poland), but accepting, at the same time, regionalisation in respect of Ukraine and Belarus, it appears that Russia fails to comply with its obligations under Articles 2.3 and 5.5 of the SPS Agreement.

Furthermore, Russia has responded to isolated cases of ASF in two Member States of the EU by closing the Russian market to all imports of the products at issue from the EU. By comparison, in the event of outbreaks of ASF in Russia, Russia does not close the entire Russian market to all domestic products at issue. For this reason also, Russia appears to act inconsistently with Articles 2.3 and 5.5 of the SPS Agreement.

In this context, it is noted that Russia does not appear to effectively control the spread of ASF in its own territory: since its introduction in the Russian territory from the Caucasus region in 2007, ASF has spread westwards and northwards, infecting the feral and domestic pig population. According to the notifications of Russia to the OIE, there were around 600 reported cases in feral

pigs (wild boar) and close to 400 reported outbreaks in domestic holdings since 2007, involving the infection of a significant number of domestic pigs. The virus strain found in the four wild boar in Lithuania and Poland appears to closely match the ASF virus strain found in the Russian territory. The cases found in the EU are also located on the border with Belarus where the disease is also present, due to the spread of the disease from Russia.

Finally, it appears that Russia has failed to avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, including with respect to different products. Such distinctions result in discrimination or a disguised restriction on international trade, which is, once again, inconsistent with Articles 2.3 and 5.5 of the SPS Agreement.

Article 8 and Annex C.1(a), (b) and (c) of the SPS Agreement

The EU has repeatedly approached Russia since early February 2014 in order to discuss adaptation of the measures at issue to the regional conditions in the EU. The EU authorities have promptly provided to the Russian authorities all requested information, in addition to further information, provided at the EU's own initiative. Furthermore, a series of bilateral meetings were held between the EU authorities and the Russian authorities during February and March 2014, at which further information and explanations were provided. Notwithstanding the information and explanations provided, Russia has failed to modify the measures at issue in order to permit the resumption of imports to Russia of the products at issue from non-affected areas in the EU and/or with respect to appropriately treated or processed products.

The resulting undue delay is reflected, *inter alia*, in:

- the administrative notice from the Russian Federal Service for Veterinary and Phytosanitary Surveillance of 12 March 2014 (FS-SD-4/3620);

- the failure to reply to invitations by EU authorities of 31 January and 14 February 2014 for urgent meetings;

- requesting answers to questions irrelevant to the case (e.g. information on establishments in unaffected areas graded by production volume and biosecurity; number and origin of foreign hunters in all Member States); and

- the belated provisions of invitations for visas for a technical meeting agreed on 21 February to take place 24-25 February 2014, which finally only took place on 7 March 2014.Accordingly, it appears that Russia has failed to observe the provisions of Annex C of the SPS Agreement on the operation of control, inspection and approval procedures and otherwise failed to ensure that its procedures are not inconsistent with the provisions of the SPS Agreement, as required by Article 8 of the SPS Agreement.

Furthermore, it appears that Russia has failed to ensure, with respect to its procedures for checking and ensuring the fulfilment of sanitary measures, that such procedures have been undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products, as required by Annex C.1(a) to the SPS Agreement.

Furthermore, with respect to Annex C.1(b) to the SPS Agreement, it appears that Russia has failed to ensure that the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; that when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; that the competent body transmits, as soon as possible, the results of the procedure in a precise and complete manner to the applicant, so that corrective action may be taken if necessary; that even when the application has deficiencies, the competent body proceeds, as far as practicable, with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained.

Furthermore, with respect to Annex C.1(c) to the SPS Agreement, it appears that Russia has failed to ensure that information requirements are limited to what is necessary for appropriate control, inspection and approval procedures.

Article 7 and Annex B, paragraphs 1, 5 and 6 of the SPS Agreement

Certain measures at issue were taken by Russia against Lithuania on 25 January 2014 (ref. FS-EN-8/1032). Russia only notified the so-called “emergency measures” with respect to Lithuania on 10 February 2014, that is, 16 days after their imposition. Other measures at issue relating to the EU have never been notified to the WTO. This appears to be inconsistent with the rules of the SPS Agreement concerning transparency.

Specifically, it appears that Russia has failed to notify changes in its sanitary measures and to provide information on such sanitary measures in accordance with the provisions of Annex B of the SPS Agreement, as required by Article 7 of the SPS Agreement. Furthermore, Russia has failed to ensure that all sanitary regulations which have been adopted are published promptly in such a manner as to enable the EU and its Member States to become acquainted with them.

It also appears that Russia has failed to notify other Members, through the WTO Secretariat, of the products to be covered by the measures at issue and the products covered, together with a brief indication of the objective and rationale of the proposed measures, including the nature of the urgent problem, at an early stage, when amendments can still be introduced and comments taken into account. It also appears that Russia failed to provide copies of the proposed measures at issue and to identify the parts which in substance deviate from international standards, guidelines or recommendations. It also appears that Russia has failed, without discrimination, to allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and to take the comments and the results of such discussions into account.

Articles I:1, III:4 and XI:1 of the GATT 1994

For the reasons stated above, the measures at issue also appear to be inconsistent with Russia's obligations under the GATT 1994, and specifically: Article I:1 (most favoured nation treatment); Article III:4 (national treatment with respect to internal regulations); and Article XI:1 (general elimination of quantitative restrictions).

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Russia’s measures appear to adversely affect exports to Russia of live pigs, fresh pork and the other products at issue originating in the EU and its Member States, and also appear to nullify or impair the benefits accruing to the EU and its Member States directly or indirectly under the cited agreements.

This consultation request relates to the measures at issue and to any amendments, supplements, extensions, replacement measures, renewal measures and implementing measures, including but not limited to any such measures referred to by either party during the course of the discussions referenced to in this consultation request.

The EU reserves the right to address additional measures and claims under other provisions of the covered agreements regarding the above matters during the course of the consultations.

The EU looks forward to receiving Russia's reply to this request and expresses its readiness to consider a mutually convenient date and place for the consultations.

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