ACROSS THE EUiverse

A Simple Tool to Enhance our Common Understanding of EU law

NUMBER FOURTEEN

July 2016
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Editorial

Nobody expected it. And because of that the shock of Brexit was all the more great. But as Theresa May says: Brexit is Brexit. And we have to live with it. There is an old Irish story about the American tourist lost down an old unpaved road. He comes upon a farmer leaning over the gate and asks: what’s the way to Dublin. The farmer looks around. And around again. He takes his time. And finally says: if I were you I wouldn’t start from here.

Well this is where we are. The EU goes on. And Across the EUUniverse goes on. And we will all have to learn to live without the UK being part of the immediate family. Should we change our language? No. English remains the common second language of all in Europe. Should we change our approach? No. The European Union is a project that must be constantly tended to and built brick by brick. We want to continue contributing to that project.

The European Union is a Union built on law and the role of lawyers is to write and understand and interpret law. That is what Across is about. As lawyers we contribute to the effort to build an ever deeper union.

In this months edition of Across we take some of the Articles from past numbers which we think are particularly important.

Giovanni Moschetta
Of Counsel, Rome and Brussels
Coordinator Across the EUUniverse

Bernard O’Connor
Managing Partner, Brussels
Editor Across the EUniverse
A European proposal for the modernisation and harmonisation of copyright law

Introduction

On 9 December, 2015, the EU Commission revealed its expected plans for the modernisation of copyright law.

According to the Commission, the goal is to adapt copyright law to technological challenges making it more European and digital-friendly, in order to “overcome fragmentation and frictions within a functioning single market”, ensure wider access to content across the EU adapting exceptions to digital and cross-border environments, achieve a well-functioning marketplace for copyright, and provide an effective and balanced enforcement system.

In particular, the strategy discussed by the Commission focuses on three topics, already indicated in the well-known Digital Single Market Communication, dated May 6th, 2015: (i) content portability across borders; (ii) copyright exceptions; (iii) enforcement.

In addition, the Commission proposals clearly aim at renewing the single market and the principle of copyright territoriality, even adapting copyright rules to new technological realities.

The Commission confirms the step-by-step approach in a context of a short-term copyright reform, without abandoning the long-term vision of EU copyright codification. The long term objectives are just moved a little further into the future.

The “portability” of online content services

With reference to the matter of “content portability”, EU Commission has taken a concrete step. In particular, “the ultimate objective of full cross-border access for all types of content across Europe needs to be balanced with the readiness of markets to respond rapidly to legal and policy changes and the need to ensure viable financing models for those who are primarily responsible for content creation. The Commission is therefore proposing a gradual approach to removing obstacles to cross-border access to content and to the circulation of works”.

In this regard, the proposal for a regulation on the “cross-border portability” of online content services ensures that users - who have subscribed to or acquired content in their country of residence - can access the above-mentioned services when they temporarily move to another Member State.

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1 As illustrated by the Communication, the “copyright framework” is a set of 10 directives, including, without limitation, the Directive on Copyright in the Information Society (2001/29/EC, the “InfoSoc Directive”) and the Directive on the Enforcement of Intellectual Property Rights (2004/48/EC, the “IPRED Directive”).


In particular, as described in the official Q&A published by the Communication in December, the European Commission wants to allow cross-border portability enabling European consumers who buy or subscribe to films, sports broadcasts, music, e-books and games at home to access them when they travel in other EU countries. In any case, the Regulation leaves service providers free to implement appropriate measures in order to verify the identity of the subscriber, bearing the liability of selecting those verification measures which effectively respect the privacy of the latter.

Therefore, the main objectives of the Commission are:

- the promotion of tools in order to bring more European works into the single market, including the creation of ready-to-offer catalogues of European films, the development of licensing hubs, and a larger use of standard identifiers of works;
- the support and development of a European aggregator of online search tools destined to end-users;
- the implementation of its dialogue with the audio-visual industry in order to promote legal offers and to find ways for a more sustained exploitation of existing European films, even exploring alternative models of financing, production and distribution in the animation sector.

Furthermore, a goal of the Regulation must be the obligation for online content service providers to offer cross-border portability to their customers. This provision will take place in the Member State in which the consumer resides, therefore, “no separate license would be required to cover the temporary use of the service in other Member States”.

The exceptions area

In the section of copyright exceptions and limitations, the Commission highlighted the scope of the exceptions relating to the field of research and education.

In particular, the project of the Commission is to take into account legislative initiatives implementing the Marrakesh Treaty and involving:

- the chance for public interest research organisations to carry out text and data mining of content they have lawful access to for scientific research purposes;
- the clarification of the EU exception for ‘illustration for teaching’, and its related application;
- the preservation of cultural heritage institutions and/or support remote consultation, in closed electronic networks, of works held in research and academic libraries and other relevant institutions, for research and private study;
- the clarification of the so-called ‘panorama exception’.

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5 “European Commission - Fact Sheet. Making EU copyright rules fit for the digital age - QUESTIONS & ANSWERS”.

6 The Marrakesh Treaty promised to “Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled”.

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With reference to this last point, it must be underlined that what it is expected is a concrete commitment to a strong exception for Freedom of Panorama. At the same time, on the other mentioned points, it has to be noted that the language describing a possible exception for text and data mining is extremely limited both in terms of beneficiaries (‘public interest research organisations’) and purpose (‘for scientific research purposes’). Furthermore, restricting an exception for text and data mining to the public interest academic research severely underestimates the transformative potential of these technologies, and will do little to improve the competitiveness of Europe in this expanding field.

With such respect, the Commission has proposed a “three-step” test, meaning that the exceptions shall be applied only in “certain specific cases which do not conflict with a normal exploitation of a work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder”.

At the same time, the Commission underlined the importance to harmonise the levies that compensate right holders for reprography and private copying. Indeed, the Commission pointed out that many Member States imposed those levies on a wide range of media and devices, applied in many different ways across Europe. This caused a legal uncertainty that must be settled.

The Commission observed a need for action to ensure that different systems of levies imposed by Member States work well in the single market without raising barriers to the free movement of goods and services. The Commission has also explained that “Issues that may need to be addressed include the link between compensation and harm to right holders, the relation between contractual agreements and the sharing of levies, double payments, transparency towards consumers, exemptions and the principles governing refund schemes, and non-discrimination between nationals and non-nationals in the distribution of any levies collected”. This means that the Commission will also begin to reflect on how levies can be more efficiently distributed to right holders.

A brief outline of the remuneration of authors and performers

The Communication calls for action to ensure right protection of authors against unfair contracts. In particular, due to the strategy adopted by the EU Commission, in order to achieve a modern, more European copyright framework, in a highly competitive market-place, the authors shall be equally treated and remunerated.

The Commission examined possible definitions of the “making available” and “communication to the public” rights. In particular, the Commission must consider whether any specific action on news aggregators is needed, including intervening on rights. The Commission seems to want to take into account the different factors that influence this situation beyond copyright law, “to

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7 Must be reminded that freedom of panorama is a rule contained in some jurisdiction that allows taking photographs and video of buildings, sculptures and other art-works located in a public place, without infringing on any copyright provision subsisting in such works, and to publishing such images.
10 Reference is made to the Directive 2001/29/EC.
ensure consistent and effective policy responses. Initiatives in this area will be consistent with the Commission’s work on online platforms as part of the digital single market strategy”.

Lastly, it has to be considered whether solutions at EU level are required in order to achieve legal certainty and balance in the area of remuneration of authors and performers in the EU, even taking national competences into account.

The expected balanced enforcement

At the end of its Communication, the EU Commission also announced that there is a need for concrete reform in the field of enforcement.

In particular, the role of intermediaries in the fight against copyright infringement must change. As seen in the official Q&A, “the Commission will facilitate the development of efficient and balanced “follow the money” initiatives which aim at depriving commercial-scale infringers of intellectual property rights of their revenue flows. This process will involve rights holders and intermediary service providers (such as advertising and payment service providers and shippers) but also consumers and the civil society”

In other words, this means that internet service providers shall not be liable for the content that they hold and/or transmit passively. However, intermediaries should take effective action to remove illegal content, both in case of illegal information (e.g. terrorism/child pornography) and in case of infringing information (e.g. copyright).

The Commission will ask for more rigorous procedures in order to remove illegal content, such as ‘notice and action’ mechanisms and the ‘take down and stay down principle’).

All in all, the Commission package has regard to emerging issues relating to the full harmonisation of copyright in the EU, even in the form of a single copyright code, creating a situation “where authors and performers, the creative industries, users and all those concerned by copyright are subject to the very same rules, irrespective of where they are in the EU”.

On a long-term basis, the purpose is to build a European single market, where the different cultural, intellectual and scientific productions “travel across the Europe as freely as possible”.

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11 “European Commission - Fact Sheet. Making EU copyright rules fit for the digital age - QUESTIONS & ANSWERS“.
Apple vs FBI: the battle has just begun

Who will win the battle between privacy and cyber security? Is it a real battle or just a fake problem that has emerged on both sides of the Atlantic in order to exert pressure in the data flow debate? Who benefits from fomenting this old conflict between rights and freedoms on the one hand and security, both physics and cyber, on the other? Will the new Privacy Shield and GDPR, the new General Data Protection Regulation, with its principles of privacy by design, accountability and privacy by default, succeed in clarifying, once and for all, the boundaries where national security needs, the safety of citizens and the legitimate defence against terrorism meet with the enjoyment of fundamental freedoms, such as, just to mention a few, freedom and secrecy of communications and domestic domicile inviolability? And what will happen to the legitimate interests of the companies processing user data for their different purposes, while maintaining, at the same time, high levels of trust and IT security? Is it right to entrust individuals with job of assessing the validity of a national agency request for data access due to anti-terrorism purposes?

Let’s try to clarify the matter.

1. The European legal culture, built on the blood and tears of the many who have had their rights denied by totalitarian regimes, has created antibodies that should be enough, in theory, to keep privacy and security in balance in their proper orbits without the risk of large and dramatic collisions.

2. In Italy, for instance, the Constitution already embodies the idea of a double guarantee system, through law and justice, that allows the judiciary and police force to fully carry out their duty, even temporarily compressing rights and fundamental freedoms of citizens in order to prevent and prosecute crimes, without this being considered as an attack on freedom. National security and that of its citizens is a primary asset that, without the need to resort to special laws, already finds ample provisions in the Constitution, Penal Code, Criminal Procedure, Privacy Code, restricting the full and unlimited enjoyment of rights, but only in the presence of stringent requirements and for a limited amount of time. In the light of the above, in theory, the conflict Apple/FBI would not have exploded in Italy and in other EU countries based on civil law jurisdiction. However, things are never completely linear and simple as they might appear.

3. First of all, evolving technology represents a constant challenge for laws and rules. However, the technology is in the hands of large multinational private groups, that increasingly tend to legitimacy impose their standards on a transnational basis, constantly stressing the principles of jurisdiction and sovereignty.

4. It is normal that everyone seeks to protect their own interest. But what if, such as the Apple case, a national institution of justice starts to creatively chase technology, requesting access with more and more sensitive and accurate information on each of us? At the same time, in order to avoid the excesses of mass control undertaken by certain intelligence and security agencies, can we afford to allow the big high tech multinationals as ultimate guarantors of our rights and freedoms?

5. Above all, what does not help is everyone going in conflicting directions. We need uniform signals and answers to these challenges. What will happen when the Internet of Things will be really popular and dominate our daily lives? The era of big data is here and we cannot allow the judiciary, nor intelligence agencies, or private investigators or, worse, hackers, to
have indiscriminate access to data collected from thousands of interconnected objects that control our bodies or drive our cars. However, at the same time, we cannot delegate the safeguarding of our rights to private companies that have as their objective the making of profit.

It is therefore time to rethink the relationship between States and the privacy of their citizens, not in an emergency perspective that has led to the signing of the Privacy Shield nor in the context of the debate on GDPR. We now need international treaties that put both the individual and internet in the driving seat. These are the indissoluble duo that we must all learn to deal with and legislate for on the basis of our shared European culture. We have got to set aside the end of Schengen or Brexit. Here we need to come together and forge new and enduring partnerships.
There is no lesser duty rule in EU trade defence law

Executive summary

What is the basis of the EU practice of choosing the lesser of the dumping (subsidy) or injury margins as the basis for setting anti-dumping or anti-subsidy duties? Is there a lesser duty ‘rule’\(^{12}\) in EU or WTO law?

And if there is a ‘rule’ is it applied correctly by the EU Commission.

The note concludes that:

i) there is no rule in EU (or WTO) law requiring that an anti-dumping or anti-subsidy\(^{13}\) duty should be lower than the dumping or subsidy margin. In other words, there is no Lesser Duty Rule (LDR) in EU or WTO law;

ii) there are no provisions in EU or WTO law requiring the calculation of an injury margin or indicating how an injury margin should be calculated;

iii) the injury margin calculated by the EU does not capture injury as defined in WTO and EU law.

iv) the injury margin as calculated by the EU cannot in law and in practice ever be considered adequate to remove injury (the legal test on which the LDR is based);

v) the fact that the lesser duty ‘rule’ has been applied in the EU for decades does not make a practice that is not based on law legal, or give exporters a legitimate expectation that the EU will continue to apply it.

WTO anti-dumping law does not mandate a duty lower than the dumping margin

There is no rule of WTO law requiring the imposition of an anti-dumping duty lower than the dumping margin.\(^{14}\)

Therefore the EU practice of imposing duties set at the level of the lower of the dumping or injury margins is a WTO Plus provision. The EU is not required by the WTO law to apply a lesser duty. The most recent confirmation of this view by the WTO Appellate Body (AB) is found in EC-Fasteners.\(^{15}\)

There are no provisions in WTO anti-dumping law providing for an injury margin. Consequently

\(^{12}\) This note argues that the word ‘rule’ should not be used in relation to the discussion on the use of duties based on the lesser of the dumping and injury margin.

\(^{13}\) This note looks at EU and WTO anti-dumping law rather than anti-subsidy law, as the provisions of the relevant anti-subsidy law mirror those of the anti-dumping law.

\(^{14}\) In simple terms, there is no Lesser Duty ‘Rule’ in WTO law.

\(^{15}\) WT/DS/397 EC-Definitive Anti-Dumping measures on certain iron or steel fasteners from China/AB/R, 15 July 2011,
there are no provisions on how to calculate an injury margin. WTO law requires that there is a determination of injury. Certain economic criteria have to be examined. Not all factors have to show injury. In fact WTO (and EU) law allows measures to be imposed on the basis of the threat of injury. If an injury margin was necessary, or even within the logic of anti-dumping law, how would it apply to a finding of a threat of injury?

Article 9(3) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the WTO ADA) provides:

[the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.]

Article 9(1) of the ADA provides in relevant part:

It is desirable...that the duty be less than the [dumping] margin if such lesser duty would be adequate to remove the injury to the domestic industry.

The concept of applying a duty lower than the dumping margin has been addressed by the WTO Appellate Body in the EC-Fasteners case. The view of the AB is clear. There is no binding rule in WTO imposing an obligation to set the anti-dumping duty at a level lower than the margin of dumping. The AB held:

[the mandatory nature of the first and second sentences of Article 9.2 can be contrasted with the preference expressed in the second sentence of Article 9.1 for duties lesser than the margin of dumping, if lesser duties are adequate to remove the injury to the domestic industry. To express such a preference, Article 9.1 uses the expression "it is desirable." ]

In US–India Plate, India argued that the US Department of Commerce (USDOC) should have considered applying a lesser duty as one form of "constructive remedy" under Article 15 ADA. However, the Panel disagreed with India stating:

India suggests that the USDOC should have considered applying a lesser duty in this case, despite the fact that US law does not provide for application of a lesser duty in any case. We note that consideration and application of a lesser duty is deemed desirable by Article 9.1 of the AD Agreement, but is not mandatory. Therefore, a Member is not obligated to have the possibility of a lesser duty in its domestic legislation. We do not consider that the second sentence of Article 15 can be understood to require a Member to consider an action that is not required by the WTO Agreement and is not provided for under its own municipal law.

In the earlier EC – Bed Linen case the Panel had found that the use of a lesser duty was a form of constructive remedy, but did not find that the imposition of a lesser duty was mandatory.

The Agreement provides for the imposition of anti-dumping duties, either in the full amount of

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16 EC-Fasteners (above) at paragraph 336.
the dumping margin, or desirably, in a lesser amount, or the acceptance of price undertakings, as a means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute “constructive remedies” within the meaning of Article 15. We come to no conclusions as to what other actions might in addition be considered to constitute “constructive remedies” under Article 15, as none have been proposed to us.

A limited number of WTO members favour amending the ADA to require an obligatory, rather than discretionary, lesser duty rule.19 The EU is not a part of this group. However, even these WTO members “acknowledge that the current provision [on the lesser duty] is not mandatory, but they chose to implement provisions to foster a better system”, and ask that “the positive actions of these Members should not be undermined under the DDA, the spirit of which is, we understand, to increase trade flows, enhance predictability and provide more transparency”.20

Conclusion on WTO law

There is no requirement in WTO to set an anti-dumping duty at a level lower than the dumping margin.

There is no concept in WTO law of an injury margin or even how an injury margin might even be calculated.

Because the possible setting the duty at below the dumping margin is facultative and not mandatory, there has been no need for WTO Members to agree on what ‘adequate to remove injury to the domestic industry’ means.

EU law does not impose an obligation to set the duty at less than the dumping margin

The Basic Anti-Dumping Regulation refers to the level of the anti-dumping duty in three different provisions:

Article 9(4) provides:

The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

19 Australia, Brazil, Chile, Colombia, Korea, Costa Rica, Hong Kong, India, Israel, Japan, Mexico, Norway, South Africa, Singapore, Switzerland, Thailand, Taiwan and Turkey. Egypt and Canada are keen on a conditioned lesser duty rule while the US or Jamaica support the use of the LDR in an optional way.
20 World Trade Organization, Negotiating Group on Rules, Lesser Duty Rule, Communication from the Delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong; China; Israel; Japan; Korea; Rep. of Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand, TN/RL/W/224. March 12, 2008. These Members recommend an amendment to Article 9(1) ADA as follows:

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member, provided that the imposition shall be permissive in the territory of all Members, and the duty shall be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

[Public Interest (note: Co-sponsors of this document do not prejudge the possible amendment on the public interest)].
Community industry.

Article 7(2) provides:

_The amount of the provisional anti-dumping shall not exceed the margin of dumping as provisionally established, but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry._

Article 8(1) provides:

_Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping and they should be less than the margin of dumping if such increases would be adequate to remove the injury to the Community industry._

There is no distinction in the three provisions relative to their correct interpretation. The law is clear:

i) an anti-dumping duty cannot, by law, be more than the dumping margin;
ii) the EU has the facility to set the duty at less than the dumping margin if such lesser duty would be adequate to remove injury to the Union industry.

So the legal texts set a maximum upper limit of the duty and the possibility of a lower amount.

The text of the EU provisions and the WTO provisions are remarkably similar. There is a mandatory element and a facilitative element. The mandatory provision ‘shall’ refers to the upper limit of the anti-dumping duty. The facilitative provision ‘should’ refers to a possible duty lower than the dumping margin. The AB in _EC-Fasteners_ has addressed this distinction, when it found:

> [1] The mandatory nature of the first and second sentences of Article 9.2 can be contrasted with the preference expressed in the second sentence of Article 9.1 for duties lesser than the margin of dumping, if lesser duties are adequate to remove the injury to the domestic industry. To express such a preference, Article 9.1 uses the expression “it is desirable”.

The text of the basic EU anti-dumping regulation in other EU languages reflects this distinction between ‘shall’ and ‘should’. ‘Shall’ is presented in the Italian version of Article 9(4) as “non deve superare” and in the French version as “ne doit pas exceder”. ‘Should’ is presented in the Italian and French versions of Article 9(4) in the conditional mood: “dovrebbe essere inferiore” and “devrait être inférieur”.

The word ‘should’ cannot, in law, be the basis of a mandatory rule. The word ‘should’ is conditional and gives to the competent authority the possibility to impose a duty at less than the dumping margin should that authority consider it appropriate and should that lesser duty be adequate to remove injury.

Two considerations flow from the wording of the text of the basic regulation.

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i) there is no lesser duty rule;
ii) the imposition of an anti-dumping duty at less than the dumping margin is facilitative.

Have the EU Courts examined this issue

Reference is made to the lesser duty in two cases. In *Allied International II* from 1985, the Court of Justice found:

*when the Council adopts an anti-dumping regulation it is required to ascertain whether the amount of the duties is necessary in order to remove the injury. In this case, however, there is nothing in the documents before the Court to suggest that the Council took into consideration that aspect of the matter.***

The Court did not consider that the imposition of a lesser duty was a mandatory requirement. Rather the Court held that the Council *is required to ascertain whether the amount of duties is necessary in order to remove injury.*

The finding of the Court of Justice in *Allied International II* can be questioned. The Court finds that ‘should’ is a requirement when it is quite clear that the word is an indication of a possibility.

That being said, *Allied International II* does not set out a rule. It requires that there be an evaluation as to whether a particular duty is adequate to remove injury. Making an evaluation of whether a duty lower than the dumping margin is adequate to remove injury is not the same as finding that the lower of two margins must always be the basis of the duty imposed. In other words, if there was a rule as to the result there cannot be an evaluation. An evaluation implies the possibility of a variety of results.

In *International Potash*, from 2000, the General Court found, in paragraph 42, that, before imposing duties, the institutions must balance the various interests at stake. It found that:

*[t]he fact that various interests are to be balanced is conveyed by the wording of Article 9(4) of the basic regulation, which provides that the amount of the anti-dumping duty may not exceed the amount necessary to remove the injury to the Community industry.*

This interpretation of the law by the EU’s lower court was not appealed to the Court of Justice. It can be strongly questioned whether this finding of the General Court is an accurate reflection of the law. The General Court uses the words ‘may not’ thus making the provision mandatory rather than facilitative. In any event, this citation does not address what the EU is required to do within the terms of Article 9(4).

What is the Commission required to do within the terms of Article 9(4)?

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The correct interpretation of the last sentence of Article 9(4) is not that the Commission is obliged to impose a duty at the level of the lower of the dumping or injury margins. The last sentence of Article 9(4) does not impose a requirement to assess whether a duty set at the level of the dumping margin is adequate to remove injury. Rather it allows the EU to make such an assessment.

Not only is there no lesser duty rule in EU law, the legality of the EU practice of setting the anti-dumping duty at the level of the injury margin, if that margin is less than the dumping margin, is not compliant with law.

There is no reference in the last sentence of Article 9(4) to an injury margin. Thus a mechanical comparison between a dumping margin and an injury margin fails to address what is made possible on the basis of the last sentence of Article 9(4).

The wording of the last sentence makes clear that the assessment is in relation to the dumping margin only. The ‘margin’ referred to in the phrase ‘should be less than the margin’ is the dumping margin. It is not an injury margin. The question is whether a duty set at the level of the dumping margin, and that margin alone, is adequate to remove injury.

The first observation is that an evaluation of adequacy could, in the abstract, result in a finding that only a duty set at the level of the dumping margin is adequate to remove injury. An examination of adequacy could also find that a duty at the level of the dumping margin was inadequate to remove injury (however, the law provides that the duty cannot exceed the dumping margin). The examination of adequacy does not necessarily imply a duty lower than the dumping margin.

The second observation is that a mechanical choosing between two margins can never be an evaluation of the adequacy of one of the margins. In other words, the provision requires the assessment of the dumping margin and does not provide for its simple replacement by another margin.

This means that to the extent that the Commission is required to make an examination of the adequacy of the level of the duty, the Commission does not carry out this assessment under current practice.

The third observation is that fixing the anti-dumping duty at the level of the same (injury) margin for all exporters does not respect the object of setting an anti-dumping duty on the basis of the margin of dumping of that exporter.

The fourth observation, as will be seen below, is that an injury margin, as determined in EU practice, is not the same as an anti-dumping duty adequate to remove injury to the Union industry.

What duty is adequate to remove injury?
A draft document of the Commission from 2013\textsuperscript{23} in relation to the calculation of the profit margin provides, under the heading Legal Basis, as follows:

2. The injury margin is the margin adequate to remove the injury to the Union industry.

3. The injury margin is calculated by comparing an exporting producer's export price with the non-injurious price of the Union industry. The latter consists of the Union industry’s cost of production plus a reasonable profit margin.

The first observation is that the statement in a draft Commission document that the injury margin is the margin adequate to remove injury does not make sense. The question is what duty is adequate to remove injury. By referring to a margin, the Commission seeks to refer to the injury margin, something that is not provided for in law.

The second observation is that, despite this apparently clear statement from the Commission, there is nothing in the basic anti-dumping regulation in relation to the calculation of the injury margin.

The third observation is that a Commission working document referring to a margin, not provided for in the basic anti-dumping regulation, does not suddenly become law and cannot, in any case, constitute a deviation from, or a change, in law.

Furthermore a statement from the Commission that the injury margin is adequate to remove injury cannot be as assessment of adequacy for the purposes of Article 9(4). The first sentences of Article 9(4) refer to the setting of the anti-dumping duty in any one investigation. As part of that investigation a specific assessment of the adequacy of the level of the duty (to remove injury) may be required.\textsuperscript{24}

The fourth observation is that the Commission calculates the margin as the difference between the export price and the Union industry cost of production plus a reasonable profit.

This methodology does not comply with Union law. Article 3(2) of Regulation 1225/2009 provides that the "determination of injury shall be based on positive evidence and shall involve an objective examination of both: the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products.

The methodology to determine an injury margin used by the Commission only assesses the impact of dumping on prices and does not assess the other injury factors. Most importantly it does not assess the impact of the volume of imports on the sales of the Union producers.

Injury is something much more than a difference in price. It can include all the injury factors to be evaluated and, from a market perspective, loss of market share to dumped imports.

\textsuperscript{23} http://trade.ec.europa.eu/doclib/cfmbcfm/doclib_section.cfm?sec=107&langId=fr

\textsuperscript{24} An assessment of the adequacy of the duty (ready duties as each exporter is entitled to an individual duty) in each investigation also means that any argument that the Commission practice of always choosing to base the duty on the lower margin is an implicit adequacy assessment does not stand up. The adequacy of the duty must be examined in relation to the dumping margin of each exporting producer which necessitates an evaluation of each of the proposed duties.
The fact that an injury margin, as currently calculated by the Commission, is less than a dumping margin, cannot be a substitute for an assessment of the adequacy of the dumping margin and cannot be the basis of a duty adequate to remove injury.

Conclusions on EU law

EU law does not mandate the imposition of a duty lower than the dumping margin.

At most, EU provides that the Commission should assess whether the anti-dumping duty should be set at the level of the dumping margin or a lower level. This assessment must be made in relation to the dumping margin and not any other margin.

The Commission does not, in current practice, carry out an assessment of the adequacy of a duty set at the level of the dumping margin to remove injury. The mechanical comparison of a dumping and an injury margin is not an assessment of adequacy.

In any event, the methodology used by the Commission to determine a margin for injury does not capture the injury to the Union industry and cannot therefore be considered adequate to remove injury.

The phrase Lesser Duty Rule in an incorrect synthesis of both EU and WTO law. To the extent that any procedure exists it should be called: the assessment of the adequacy of a duty set at the level of the dumping margin to remove injury or, in short, the Duty Adequacy Assessment.

It cannot be argued that exporters in specific investigations have a legitimate expectation that an anti-dumping duty will be based on the lesser of the dumping and the injury margins. In Case 256/84 Koyo Seiko, paragraph 20, the Court of Justice ruled that traders do not have a legitimate expectation in the use of a particular methodology for the calculation of an anti-dumping duty. In addition, in Branco, Case T-347/03, the General Court has ruled that there can be no legitimate expectations based on an incorrect interpretation of the law.

Thus there is no legitimate expectation that an incorrect application of the law will continue to apply.
Implementation of the EU Antitrust Damages Directive

The current state of play

In Copenhagen, only six years ago, the world ignored the European Union’s call to The deadline to implement the EU antitrust damages Directive (the “Damages Directive”) expires on 27 December 2016. Many member States have already launched or completed public consultations (Finland, Denmark, the Netherlands, Sweden, Norway, Latvia, the United Kingdom and Lithuania) or proposed implementing measures (Spain and Poland). The purpose of this note is to give a brief overview of the various options for implementation of the Damages Directive currently under discussion.

1. Single or dual regime

The UK Government launched a public consultation in January 2016. It addresses a fundamental policy option. Should the UK implement a separate regime for breaches of European competition law (including where European competition law is applied in parallel with UK competition law) to stand alongside the damages regime for cases under UK competition law (“dual regime”). Or should the UK apply the changes required by the Damages Directive to cases brought as a result of breaches of either European or UK law (or both) (“single regime”). The UK Government notes that where it to copy and paste the Damages Directive the result would be the adoption of a dual regime. In fact the Damages Directive only applies to cases where EU law has been applied (i.e. in instances where either EU, or both EU and domestic law are applied) and not when only domestic law is applied. It is clear from the public consultation that the UK Government is proposing the introduction of a single regime, in order to avoid uncertainty and the possibility of litigation between parties as to which regime applies. This is an issue well known in Italy where, until 2012, Court of Appeals had jurisdiction to hear claims for damages resulting from breaches of domestic competition law, while the Tribunals (the lower court) those claims based on EU law as set out in Articles 101-102, TFUE (25). It was not uncommon for this dual regime to be exploited by defendants to slow down the damages actions by challenging the choice of Court made by the claimants.

It is difficult to find any justification for the adoption of a dual regime. And yet the the Ministry of Employment and the Economy of Finland on 16 June 2015 seem to favour the dual approach when it published a working group report where it proposes that the Damages Directive will be implemented through a special Act on antitrust damages. The Act is proposed to be based on a dual regime and therefore to apply to damages actions related to Articles 101-102, TFUE and Sections 5 and 7 of the Finnish Competition Act regardless of whether the infringement has an effect on trade between Member States.

Spain intends to go even further: on 11 January 2016 the Spanish Ministry of Justice published a Legislative proposal drafted by the Special Section of the General Codification Commission on the implementation of Damages Directive proposing to apply the new regulation not only to claims arising from EU and domestic provisions prohibiting restrictive agreements and abuse of

25 After the reform occurred in 2012, both EU and domestic competition violations can now be tried in the specialized section of the Tribunal whose decision might be subject to appeal to the Court of Appeals and subsequently to the Supreme Court.
dominant position, but also to claims for damages arising from the distortion of competition through acts involving unfair competition.

2. Overcompensation

The UK public consultation does not mention the issue of overcompensation expressly prohibited by Article 3.3 of the Damages Directive, despite the finding of the Competition Appeal Tribunal in *Albion Water* and *Cardiff Bus* that exemplary damages may be available in actions for the infringement of competition law. The issue is expressly dealt in the proposal for an act implementing the Damages Directive published by the Dutch Ministers of Justice and Economy Affairs, where it is stated that the prevention of overcompensation is already sufficiently safeguarded by the existing law. It is likely that the same conclusion will be reached by most Continental jurisdictions.

3. Rules on disclosure

As expected, the UK consultation document states that the rules on disclosure set out in the Damages Directive does not require substantial changes. Indeed, English law already allows wider disclosure than required by the Damages Directive. The only change foreseen will be the introduction of protection for leniency documents.

Continental Member States will, on the other hand, require amendments to address this issue and possibly entirely new sets of rules specifically dedicated to disclosure. The most advanced and audacious proposal on disclosure is seen in Spain which proposes a completely new set of rules on access to evidence to be inserted in the Civil Procedure Act. Some of these rules will be applicable to all civil litigation. This confirms the prediction of some commentators that the impact of the Damages Directive is not limited to antitrust actions. Indeed, it could become difficult to justify the situation that wider disclosure is on available for antitrust damages actions particularly if it is denied to other violations to the law that are equally or more serious (e.g., environmental pollution, securities fraud, consumer product safety).

4. Effect of national decisions

The most interesting provision contained in the Spanish proposal is that not only the final decisions of the Spanish competition authority shall be considered to establish irrefutably the existence of an infringement of competition law, but also those decisions issued by the national competition authorities of other Member States. Article 9 of the Damages Directive, on the other hand, provides that national antitrust infringement decisions in courts of other Member States constitute "at least prima facie evidence" of the infringement, and not an irrefutable proof of breach. The Spanish proposal essentially reproduces Article 9 of the draft of the Damages Directive published by the European Commission on 11 June 2013 and not the final version of Article 9 found in the Directive. During the legislative process many Member States refused to accept the idea of the binding effect of the decisions adopted by national antitrust authorities of other States.

5. Parental liability

The Spanish proposal aims to introduce a form of parental liability already existing in the administrative procedure according to which parent companies may be responsible for the damages caused by their subsidiaries. The Finnish working group report is proposing that the purchaser of a business shall be liable for the antitrust infringements of that business if it was, or should have been, aware of the infringement at the time of the acquisition. This is an idea
not provided for in the Damages Directive, which is limited to ensuring the full compensation of victims.

6. Limitation periods

One important area of harmonisation of the rules across the Member States relates to limitation periods. In this respect, Article 10 of the Damages Directive requires that limitation periods: (i) shall only start when the breach of competition law has stopped and the claimant knows or can be reasonably be expected to know of the behaviour and the fact it constitutes an infringement of competition law, the fact the infringement caused harm and the identity of the infringer; (ii) shall be at least 5 years; and (iii) can be suspended in various circumstances, including in order to allow a competition authority to investigate the breach of competition law.

From the examination of the various public consultations/proposal it seems that most Member States intend, in essence, to copy into domestic law the provisions of the Directive on limitation periods. This seems the correct approach particularly as differences in approach could encourage forum shopping.

7. Conclusions

The implementation of the Damages Directive is certainly a complex exercise. The decision to launch public consultations in those Member States that have chosen to do so should be welcome, since it encourages a wide debate that could favour a correct implementation of the Damages Directive particularly where the Directive leaves discretion to the Member States.

On the basis of our first analysis of the on-going consultations, it seems that, except for limitation periods, the Member States do not intend to follow the usual approach to the implementation of Directives, namely to copy them into national law as far as possible. This was to be expected give the significant differences in national law procedures and approaches to the whole issue of damages. It seems for the moment that the EU is not likely to end up with a standardised approach.
KISS with ODR: keep it short and simple with Online Dispute Resolution

The number of disputes arising from doing business on the internet is on the increase. In order to unlock the e-commerce potential and to drive the Digital Single Market forward, European Commission has launched a new platform where EU citizens will be able to resolve online dispute without going through a court. This article aims to explain the idea that underlies the ODR, to explain how it works, and to summarise the steps which traders should take in order to be compliant with ODR legislation.

Why do we need ODR?

The online dispute resolution (ODR) is a new platform launched by the European Commission in order to help consumers and traders resolve online disputes both for domestic and cross border purchase of goods and services, without the need to go to court.

The idea of settling disputes in an alternative way - instead of going to court – is not new. Arbitration and amicable settlement procedures are common. But they need adapting to the internet age. As internet usage continues to expand, it has become increasingly necessary to design efficient mechanisms for resolving Internet disputes because traditional mechanisms, such as litigation, can be time-consuming, expensive and raise jurisdictional problems. Both consumers and traders ask a low cost, simple and fast procedure which can avoid to go through lengthy and costly court proceedings.

Arbitration bodies allow the settlement of disputes out of court. They are generally known as ADR or Alternative Dispute Settlement. They involve a neutral third party to act as an intermediary between consumers and traders. The ADR entity can suggest or impose a solution or simply bring the two to discuss how to find a solution. ODR is the evolution 2.0 of ADR: it is like an ADR procedure but conducted entirely online.

The legal framework

Pursuant to Article 169 TFEU the European Union is competent to legislate in the area of consumer policy even if it is a shared competence with the Member States.

The legal basis for the establishment of the ODR platform is the Regulation 524/2013 adopted by the European Parliament and the Council on 21 May 2013 which describes the main functions of the platform as well as the workflow for a dispute that is submitted through the plat-

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form. The Regulation builds upon the Directive 2013/11/EU\(^2\) - implemented into Italian law by Legislative Decree 6 August 2015 n.130 - which provides the legal basis for ADR as a whole. According to an EU Factsheet from January – issued by the Directorate-General for Justice and Consumers – the Directive ensures that consumers have access to Alternative Dispute Resolution when seeking to resolve their contractual disputes in virtually all economic sectors no matter where (domestically or across borders) and how (online/offline) the purchase was made. The Directive has provided for full ADR coverage at EU level. In every Member State and for all contractual disputes in every market sector there will be an ADR procedure available. The Commission is working with the Member States in order to achieve a full coverage of all Member States and sectors as soon as possible. The complaints from a consumer living outside the EU and from a consumer complaining about a trader established outside the EU, or from a consumer complaining about goods or services bought offline (e.g. physically in a shop) are not covered by the Directive. The complainants about higher education or healthcare services are not accepted either.

**How does the ODR platform work?**

The ODR platform is developed and operated by the European Commission. It has been opened since 9 January 2016 and available for use since 15 February 2016. The platform offers users the possibility to conduct the entire resolution procedure online, it is user-friendly and multilingual. There are four steps:

1. The consumer fills and submits an online compliant form;
2. The compliant is sent to the relevant trader, who proposes an ADR entity to the consumer;
3. Once the consumer and trader agree on an ADR entity to handle their dispute, the ODR platform transfers the complaint automatically to that entity. The ADR entities are bodies that comply with the binding quality requirements established by the ADR Directive and which are included in the National list of ADR bodies;
4. The ADR entity handles the case entirely online and should reach a conclusion within 90 days.\(^2\)

The ODR platform involves lots of practical benefits both for consumers and for traders.

The first added value of settling a dispute on ODR platform is that users (read here European citizens, consumers or traders) will be more confident in trading online and across borders because they know that any potential dispute can be solved in a quick and low cost way, and - the most important thing – not only out of court but even from their home.

The Commission estimates that 60% of EU traders do not sell online to other countries because of the difficulties in resolving potential problems which could be arise from a dispute over the sale.

EU Justice Commissioner Vera Jourova said, “One in three consumers experienced a problem when buying online in the past year. But a quarter of these consumers did not complain mainly

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\(^2\) These four steps are explained in the EC Factsheet of January in the Section Justice and Consumers.
because they thought the procedure was too long or they were unlikely to get a solution. The new online platform will save time and money for consumers and traders.”

On the other hand, the ODR practice presents an intrinsic contradiction. Mediation is generally based on a face-to-face discussion of the issues between participants. The mediator typically plays the role of the helping party who listen and understands concerns and moreover, who helps parties to empathize with each other.

Online mediation loses the dynamics of traditional mediation because it takes place at a distance and in front of computer screens, rather than with face-to-face communication. Some authors have argued that the lack of personal presence in online mediation can make it more difficult for the mediator to maintain effective control over the negotiating parties.

Traders’ duties

Every online trader will be required under the new legislation to comply with certain obligations:

1. Provide an electronic link to the ODR platform on their website;
2. Moreover, in every commercial offer to consumers made by e-mail, similar information should be included in the e-mail;
3. The information shall also be provided in the general terms and conditions applicable to online sales and service contracts.

Currently, non-compliance with the ADR Regulation could result in Trading Standards civil enforcement which could escalate into a court order to comply with the Regulations. Member States will be responsible for elaborating rules on penalties applicable to infringements which cloud result in an unlimited fine or up to two years in prison.

The new EU Customs Code

The new European Union Customs Code has replaced the paper-based Community Customs Code, introducing considerable changes that impact on various aspects of customs law and practice. The scope of this note is to give a brief overview of the Union Customs Code and set out the most significant changes.

The UCC was enacted in order to modernise, streamline and update EU custom law that had become obsolete. It is clear that the customs code must adapt to the technological evolution of international trade. While in the 80’s – when the CCC was formulated – a single crane could unload 1,000 tons per hour, today a single crane can handle 3,500 tons per hour\(^{32}\). This means that a paper-based system such as that of CCC, has reached its limits. The international trade needs more efficient tools than the ones used in the past. For this reason it appeared necessary to introduce drastic changes for customs administrations and world trade.

The UCC also intends to harmonise and reduce the number of custom procedures across the Member States, organise them in a new structure and create an electronic system to accelerate entry and exportation procedures.

The companies involved in the import and/or export of goods\(^{33}\) into and within the EU will be affected by the UCC. As a consequence companies should be more compliant with the applicable laws also because, for instance, the UCC introduces more checks on the correct application of authorizations. As a matter of fact, one objective of the UCC is to avoid errors and to reduce the number of post release recoveries and repayments. In addition the operators will no longer need to provide information to multiple government agencies as the new “one-stop-shop” system will allow data to be disseminated automatically throughout the EU\(^{34}\). Moreover, in order to get more benefits from the new provisions of the UCC, the companies shall show a solid record of compliance, and in most cases, require an Authorised Economic Operator (the “AEO”) certificate.

At a glance, the key changes under the new Code will be:

- the abolition of the first sale rule for customs valuation and consequently the introduction of the last sale rule;
- the increase in dutiability of royalties and licence fees;
- the introduction of trademark royalties;
- all communications between customs authorities and economic operators must be electronic;
- goods removed from a customs warehouse and entered into free circulation in the EU, pursuant to sale to an EU customer, shall be valued based on the value of the

\(^{32}\) See Catherine Truel and Emmanuel Maganaris “Breaking the code: the impact of the Union Customs Code on international transactions”, in World Customs Journal, Volume 9, Number 2.

\(^{33}\) The term “goods” is not further defined in either the TFEU or the UCC, however the ECJ defined “goods” in the context of customs duty, in Commission v. Italy [Case 7/68 EC Commission v. Italy [1968] ECR 423] as “products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions”. The term “goods” also includes gas and electricity (see Case C-158/94 Commission of the European Communities v. Italian Republic ECR I – 5789).

\(^{34}\) UCC Article 47.
transaction to the EU customer;

- introduction of mandatory guarantees for most special procedures;
- the potential need to have AEO status in order to benefit from certain customs simplifications and reliefs.
- centralised clearance and self assessment expected to be introduced in 2020 but will only be available for companies that have AEO status.

Abolition of the first sale rule

The first sale rule has been repealed and replaced by the last sale rule. Under the first sale rule companies could use the value of an earlier sale in the supply chain as the custom value, if it can be determined that the earlier sale took place for export to the EU. Under the old rules “the primary basis for the customs value of goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory, adjusted, where necessary”. The customs value of imported goods will be determined at the time of acceptance “of the customs declaration on the basis of the sale occurring immediately before the goods are brought into the customs territory”. The UCC has introduced the last sale rule replacing the first sale rule in order to avoid that the final price results like the amount of the sales from the manufacturer for export to the EU. On the assumption that this change will have a crucial impact on the companies that currently use the first sale rule, the UCC has provided a so-called sunset clause which allows the companies to keep on using the first sale rule until 31 December 2017.

Royalties, licence fees and trademark royalties

Under the UCC the royalties or licence fees are generally payable as a condition of sale, irrespective of the relationship between the manufacturer and third party licensor, and must be included in the customs value. According to UCC rules also the trademark royalties are dutiable without exemption and consequently the companies must pay trademark royalties in connection with imported goods into the EU pursuant the same rules as royalties and licence fees.

Benefits related to holding of AEO status

Customs Simplifications and Security and Safety are the only two types of authorization remaining in the Code. Under the current legislation, holding AEO status or meeting AEO status criteria has become mandatory in order to be admitted to several benefits such as Centralised Clearance and Self Assessment. There are even other facilities which do not require to have the AEO status. This means that the UCC strongly encourages companies to become AEO accredited in order to keep or maintain specific facilitations and simplified procedures. To

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35 UCC Article 70.
36 IA Article 128 (1).
37 UCC Article 38 (2)(a)
38 UCC Article 38 (2)(b).
39 UCC Article 179 (2). This procedure allow the authorized operators to declare goods electronically and pay customs duties at the place where they are established, irrespective of where the goods actually entered or exited the EU.
40 UCC Article 185 (2). This procedure allow an authorized operator to make perform certain formalities /controls normally undertaken by customs. In that way the economic operator is responsible for lodging an import/export declaration.
become an AEO a trader must have:

a. a solid record of compliance. The compliance track record requirement includes not only the compliance track record of import duties but also VAT, excise duties, corporate income tax and other taxes;

b. a satisfactory system to manage commercial and transport-related data;

c. adequate and technologic record-keeping capabilities. AEO holders need to have employees that can either demonstrate practical competences or hold professional qualifications;

d. business solvency;

e. maintain high safety standards.

It should be noted that companies which have committed any serious infringement of customs law are not currently eligible for AEO.

**Introduction of mandatory guarantee**

Under the CCC the Customs Authorities had discretion to set and decide when a guarantee had to be released by the companies. The UCC has now introduced mandatory guarantees to be released by the companies in order to cover potential and actual debts.

The Code is fully in force now for less than one month; therefore a preliminary balance if its effects on the market can not be drawn yet. However, it is already working well and is a clear improvement on the past.

**Some details on the legal provisions**

On 1 May 2016 the Union Custom Code\(^\text{41}\) (the “UCC” or the “Code”) – as consequence of the entrance into force of the Delegating Acts (the “DA”) and Implementing Act (the “IA”) – has become applicable in full repealing the Community Customs Code\(^\text{42}\) (the “CCC”) and replacing significant aspects of the existing law.

The Delegated Act and Implementing Act together with the Transitional Delegated Act\(^\text{43}\) (the “TDA”) will operate until 2020 at the latest.

The DA was adopted on 28 July 2015 as Commission Delegated Regulation No 2015/2446 and then has been modified twice. The UCC Delegated Act supplements certain non-essential elements of the UCC.

The IA was adopted on 24 November 2015 as Commission Implementing Regulation No 2015/2447. The UCC Implementing Act intends to ensure the existence of uniform conditions for the implementation of the UCC and a harmonised application of procedures by all Member States.


\(^{43}\) Since the UCC is based on the use of electronic data processing and it is dependent on the availability of IT systems across Member States, the TDA allow the Member States’ Custom Authorities to continue using an existing IT system and/or paper based systems as long as the new systems are not ready. In fact, IT systems that need to support the UCC are not yet complete.
The IA and the DA were published in the European Union’s Official Journal on December 29, 2015.

The TDA was adopted on 17 December 2015 as Commission Delegated Regulation No 2016/341. Annex 12 of the UCC Transitional Delegated Act has been corrected by a Commission Delegated Regulation was published in the Official Journal (L121) on 11 May 2016. The TDA addresses all the transitional phases up to full implementation in 2020.
The implementation of European Retail Action Plan: where we stand

Retail and wholesale services are key for the EU economy. They account for 11.1% of the EU’s GDP and provide around 33 million jobs (almost 15% of total employment in the EU). Over 6 million companies in the retail sector act as intermediaries between thousands of product suppliers and millions of consumers. E-commerce has increased the potential market for retailers and the scope of products available to consumers. The European Commission aims at ensuring that EU wholesalers, retailers and consumers are part of an integrated retail market.

European retail services present a diverse and complex picture. Hence, there is no an unique and homogeneous solution or approach to the challenges they face. The diversity of the retail sector includes differences in terms of the type of providers (SMEs or larger companies), organization (groups of independent retailers, cooperatives, corporations, etc.), outlet sizes, formats, products lines, the supply chains involved, locations, business models, levels of vertical integration, ownership structures and size of operations.

Currently, retailers face varied challenges depending on their size and sector of activity. The development of e-commerce is also putting pressure on the retail sectors to reinvent its business models. In addition, a blurring of the borderlines between sectors (the scope of retail services continues to broaden through the constant addition of new products and services, including financial, telecommunications and travel services, utilities, etc.) means that business models are becoming more and more multifaceted. Global phenomena, such as the consequences of the financial crisis for consumers purchasing power, rising commodity prices, demographic trends, in particular the aging of the EU population, and the drive for sustainability, all challenge existing retail business models and processes.

The European Retail Action Plan (ERAP) aims at addressing key obstacles to achieving a Single Market in Retail by setting out a strategy to improve the competitiveness of the retail sector and enhance the sector’s economic, environmental and social performance. It was clear that its strategic goals cannot be met simply by top-down measures, but will require the active collaboration and initiative of the retail sector itself. For example, responsibility for the investment in skills will have yet to be shared, and the retail sector must play an important role here, alongside Governments, individuals, and the educational sector.

Eleven concrete Actions are identified in ERAP. All of these are legally relevant, as future legislative proposals:

- Through dialogue with stakeholders, the Commission will develop good-practice and guidelines and/or codes of conduct to facilitate consumer access to transparent and reliable information, making it easier to compare prices, quality and the sustainability of good services;

- The Commission will propose European methodologies for measuring and communicating the...
overall environmental impact of products and organizations;

- Member States must remove all remaining instances of non-compliance with unequivocal obligations under the Service Directive45 concerning access to, and exercise of, retail activities, including eliminating economic needs tests within the meaning of Article 14§546 of the Service Directive. The Commission will apply its zero-tolerance policy through infringement procedures, where appropriate;

- The Commission will launch a performance check in the retail sector to explore how commercial and planning rules and are applied on the ground by competent authorities where a potential service provider wishes to set up a small, medium or large retail outlet; through exchange of best practices, provide for greater clarity regarding the proper balance between freedom of establishment, spatial/commercial planning, and environmental and social protection;

- The Commission will adopt a Green Paper detailing the common features of UTP’s47 in the B2B food and non-food supply chain and open a consultation the results of which will be available by late Spring 2013. The results of the consultation will feed into an impact assessment of the different options identified to address the issue at EU level;

- In the Context of existing EU Platforms, the Commission will support retailers to implement actions to reduce food waste without compromising food safety (awareness raising, communication, facilitating of redistribution to food banks, etc.) e.g. through the Retail Agreement on Waste48; and work on developing a long-term policy and food waste, including a Communication on Sustainable Food to be adopted in 2013;

- Through dialogue with stakeholders, the Commission will define best practice to make supply chains more environmentally-friendly and sustainable and minimise the energy consumption on retail outlets. The Commission will encourage retailers in the context of existing fora to apply these best practices;

- On that basis, the Commission will design concrete actions focused on boosting retail competitiveness, such as bringing research results to the market faster, integrating the e-commerce and brick-and-mortar environments, new ways of informing consumers about products, the development of innovation-friendly regulations and standards etc.;

- The Commission will examine the feasibility of setting up a dedicated database containing all EU and domestic food labelling rules and providing a simple way to identify labelling requirements

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46 5) the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority; this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest.
48 A total of 23 companies and two associations have joined the agreement now. It was developed under the framework of the Retailers’ Environmental Action Programme (REAP). In March 2009, in response to the European Commission’s Action Plan on Sustainable Consumption and Production, a number of progressive retailers decided to proactively contribute to the process, and launched this Action Programme. Signatories to REAP were keen to address some of the current environmental challenges. They recognised their strategic role in the supply chain and the important contribution they can make to sustainability and to society as a whole by setting the example.
- The Commission will take measures to ensure better market integration for card, internet and mobile payments through a) revision of the Payments Services Directive; b) an enhanced governance model for retail payments services; c) a legislative proposal on multi-lateral interchange fees for payment cards;

- The Commission will strengthen cooperation with social partners to create conditions that make it possible to match skills with labour market needs in the retail sector, particularly by identifying and anticipating skills needs through an EU Sectorial Skills Council, and by improving retailers training and reskilling policies.

Currently the European retail services sector present a diverse and complex picture. Hence, there is no “one size fits all” solution or approach to the challenges they face. The diversity of the retail sector includes differences in terms of the type of providers (SMEs or larger companies), organization (groups of independent retailers, cooperatives, corporations) outlet sizes, formats, product lines, the supply chains involved, locations, business models, levels of vertical integration, ownership structures and size of operations.

Consequently the European Commission published in 2015 a Report describing the measures taken by the Commission to implement the 11 concrete actions identified in ERAP. In addition, a High Level Group on Retail Competitiveness was set up to advise on retail policy.

Through dialogue with stakeholders the Commission will develop good practice guidelines and/or codes of conduct to facilitate consumer access to transparent and reliable information, making it easier to compare prices, quality and the sustainability of goods and services.

Further the Commission will propose European methodologies for measuring and communicating the overall environmental impact of products and organizations.

A Recommendation (2013/179/E) on the use of common methods to measure and communicate the life cycle environmental performance of products and organizations.


Member States must remove all remaining instances of non-compliance with unequivocal obligations under Service Directive concerning access to, and exercise of, retail activities, including eliminating economic needs tests within the meaning of Article 14§5 of Services Directive. The Commission will apply its zero-tolerance policy through infringement procedures, where appropriate.

The Commission will carry out a performance check in the retail sector to explore how commercial and spacial planning rules and plans are applied on the ground by the competent authorities where a potential service provider wishes to set up a small, medium or large retail

49 All these proposals are in preparations by the EU Commission.
outlet.

The Commission will adopt a Green Paper\textsuperscript{50} detailing the common features of UTPs in the B2B food and non-food supply chain and open a consultation the result of which was be available by late spring 2013.

In the context of existing EU Platforms, the Commission will support retailers to implement actions to reduce food waste without compromising food safety (awareness raising, communication, facilitating of redistribution to food banks, etc.) e.g., through the Retail Agreement on Waste; and work on developing a long-term policy on food waste, including a Communication on Sustainable Food adopted in 2013.

Through dialogue with Stakeholders, the Commission will define best practices to make supply chains more environmentally-friendly and sustainable and minimise the energy consumption of retail outlets. The Commission will encourage retailers in the context of existing fora to apply these best practices.

The Commission also launched a retail innovation initiatives in 2013 whereby the Commission, with the help of a high-level experts, will explore how to ensure that the retail sector can contribute to, and benefit from, innovative products, services and technologies.

The Expert Group on Retail Sector Innovation, in its final report of 2014 has made concrete recommendation targeted at:

\begin{itemize}
  \item Building awareness of the potential of retail innovation for competitiveness, and of opportunities to boost retail innovation and to stimulate cooperation among stakeholders;
  \item Ensuring greater participation by retail firms of all sizes in European innovation projects;
  \item Identifying and stimulating investment in retail skills that increase potential for retail sector innovation;
  \item Ensuring that regulation work as a driver for retail sector innovation.
\end{itemize}

The Commission will examine the feasibility of setting up a dedicated database containing all EU and domestic food labelling rules and providing a simple way to identify labelling requirements per product.

During the last two years the Commission has taken measures to ensure better market integration for card, internet and mobile payments through a revision of the Payment Services Directive was adopted in 2015.\textsuperscript{51}

Finally, the Commission will strengthen cooperation with social partners to create conditions that make it possible to match skills with labour market needs in the retail sector, particularly by identifying and anticipating skills needs through an EU Sectorial Skills Council, and by improving retailers training and reskilling policies.

\textsuperscript{50} A Green Paper on unfair trading practices (UTPs) was adopted on January 2013. Following the results of the public consultation based on the Green Paper, the Commission decided to concentrate its work on UTPs in the food sector and adopted a Communication on taking unfair trading practices in the business-to-business food supply chain (COM(2014)472 final of 15 July 2014).

**Reloading data protection: will the new EU Regulation really checkmate multinationals and revamp individuals’ right to privacy once and for all?**

Current EU data protection law, based on Directive 95/46/EC, has finally been sentenced to death: on 14 April, in fact, after four long years of negotiations at the institutional level, the European Parliament adopted the data protection reform package, the so-called “GDPR – General Data Protection Regulation”, which marked a crucial milestone for the birth of a stronger European-wide right to privacy.

This fundamental step comes at a time where significant advances in information technology have been achieved and there have been radical transformations to the ways in which individuals, organisations and public institutions communicate and share information.

Therefore, the divergent approaches in implementing EU data protection laws taken by than ever and pushed the EU towards new and more effective ways to harmonise European privacy legislation.

Furthermore, European citizens’ growing awareness on risks and dangers relevant to their personal data (i.e. also driven by recent global outrage for massive surveillance scandals and data breaches), fostered the approval of a common set of rules applicable within and outside the EU’s borders.

Nonetheless, despite the significant efforts by the legislature to re-think the basis of EU personal data privacy law, the final deal was not as comprehensive as initially hoped. In fact the process of adopting this law shows that you cannot have the best of both worlds.

The final version of the package adopted on 14 April 2016 by the European Parliament – and then published on the EU Official Gazette on 4 May 2016 – is therefore the synthesis of the most suitable and viable compromise solution EU legislators could buy into bringing privacy law to a higher level of complexity, while setting aside controversial topics for future institutional talks, i.e. “hot potatoes” including the e-Privacy Directive reform, employment issues and, last but not least, the new EU-US Privacy Shield.

In essence then, the reform package, made up of a Regulation (i.e. the General Data Protection Regulation or GDPR) and a Directive (i.e. the Police and Criminal Justice Data Protection Directive), represents a fundamental keystone for the creation of the future EU Digital Single Market and an important step towards greater legislative harmonisation on privacy and data protection issues across the continent.

The package will now enter a two years’ implementation period during which Member States will have to adapt domestic legislation to the new EU rules by 25 May 2018.

In fact, over the course of this time-frame, organisations need to understand clearly what changes are most likely to affect their sector of activity and be prepared to assess their level of compliance with the reform’s new requirements.

As for the definition of the traditional categories of players subject to accountability in EU privacy law’s “chain of responsibility” (i.e. data controller and data processor), many of the core definitions from the previous Directive remain essentially unchanged.
At a national level, for instance, in Italy, the legislator and the Italian Data Protection Authority (i.e. the Garante), after having found themselves faced with the difficult task of balancing the reform package with the current domestic regulatory framework and adapting it to Italian legal terminology, decided to maintain the current translation of “data controller” (i.e. titolare del trattamento) and “data processor” (i.e. responsabile del trattamento) in order not to cause unnecessary interpretative burdens for public and private entities processing data.

Moreover, the entry into force of the GDPR will definitely cause major concerns for private and public institutions operating in several areas (e.g. from banking to health care) because of stricter and more pervasive privacy obligations to comply with.

Where the Regulation will be deemed to be applicable to a business entity processing personal data, for example, the entity will need to provide clear evidence that it is in full compliance with the new rules to either national Data Protection Authorities and the future European Data Protection Board, which will replace Article 29 Working Party’s role and functions.

Same thing will apply to the public sector and, for the very first time, also to data controllers and processors based outside the EU but conducting businesses (i.e. processing data) within EU borders.

Currently, if a data controller is established in any Member State, it is considered subject to the discipline established by the Directive as implemented by national laws and regulations of that legal system, however under the GDPR this distinction will fall apart.

The Regulation, in fact, will only apply in case that a legal entity, either public or private, offers goods or services to data subjects in the EU or monitors their behaviour within the borders of the EU.

For instance, a business established in the US that markets its products directly in the EU single market but has no physical presence in the EU, will now be subject to the requirements of the GDPR as if it was established on European soil.

This important aspect, along with others (e.g. the obligation to conduct regular privacy impact assessments, the new privacy by-design and by-default principles or the duty to appoint a data protection officer and a national Representative where prescribed), are an expression of the strategy behind the desire to regulate and adequately circumscribe the power of telecom and digital multinationals processing personal data of EU citizens through a borderline approach to privacy compliance.

In fact, the entry into force of the GDPR will indeed force big companies that have previously regarded non-compliance with EU data protection law as a “calculated risk” to re-evaluate their position especially in light of the substantial new fines (i.e. up to € 20 mln or 4% of the annual worldwide turnover) and increased enforcement powers given to national Data Protection Authorities (e.g. total ban on processing and in depth investigative capacity above all).

On the other hand, the same companies processing personal data, either from within the EU or outside, will benefit from a significant degree of autonomy in dealing with Member States’ data protection authorities through the new One-Stop-Shop mechanism, which will connect controller and processor with a single “lead authority” on the basis on the location of its “main establishment”, i.e. the place where the main processing activities take place.
It is now clear how difficult has it been for EU legislators to combine civil society’s push for a stronger protection of the individual right to privacy with legitimate interests of companies to collect and process personal data. But a compromise solution has been successfully achieved.

With a greater simplification and a substantial de-bureaucratisation of some privacy obligations (*i.e.* same rules apply in all EU Member States with no need to contact twenty eight national DPAs), comes the revamped focus on data protection in all corporate policies and regulations as a guarantee of stronger and deeper protection to individuals’ rights.

As for Italy, the Garante’s serious approach to the new rules will surely show a reasonable and sound approach in choosing how to better integrate the letter of the GDPR with the Italian Data Protection Code (*i.e.* Legislative Decree no. 196 of June 30th, 2003).

In conclusion, only time will tell whether more stringent and incisive privacy rules have been enough to raise and consolidate EU and global data protection standards and made IT compliance and cyber security a number one priority for all companies and public institutions.

There is still a long way to go for the full implementation of the GDPR. Different Member States still have some room for different approaches. However the key development is the recognition that privacy compliance is a real strategic asset for the private and the public sector alike and the birth of a corporate culture of data protection and social responsibility might be closer than it seemed even in recent years.
Does China respect its WTO Commitments?

When China acceded to the WTO in 2001 it made a series of commitments to change its national law on a wide variety of issues. These commitments were part of the agreement that allowed China to become a member of the WTO and are set out in China’s Protocol of Accession to the WTO.

It can be questioned whether China has complied with a number of its Protocol commitments. In this note we highlight 10 of those commitments which are fundamental to the functioning of a market economy and do not appear to have been respected.

All the provisions of the Protocol were drafted with the the object of facilitating China’s accession to the WTO in anticipation of it becoming a market economy.

Commitment No 1: Prices in every sector must be determined by market forces

Section 9 of China’s WTO Protocol of Accession provides that China shall allow prices for traded goods and services in every sector to be determined by market forces, and multi-tier pricing practices for such goods and services shall be eliminated.

Exceptions to this requirement are quite limited and are set out in Annex 4 of the Protocol. The products covered in Annex 4 are certain agricultural products, certain pharmaceuticals, natural gas and processed oils.

Other than these very limited exceptions, China committed to allowing prices to be set by the market immediately in 2001. Even for the exceptions, China committed to “make best efforts to reduce and eliminate” them.

As China has not allowed a true competitive market to develop for many products, and indeed government intervention and influence continues in 2015 to pervade key sectors of the Chinese economy, many key prices are not being determined by market forces.

Commitment No 2: All subsidies to be notified to the WTO and prohibited subsidies to be eliminated

• Under Section 15 of its WTO Accession Protocol, China agreed to notify to the WTO any subsidy within the meaning of Article 1 of the SCM Agreement, granted or maintained in its territory, organised by specific product, including those subsidies defined in Article 3 of the SCM Agreement. The information provided was to be as specific as possible, following the requirements of the questionnaire on subsidies.

• China also committed itself to eliminate all subsidy programmes falling within the scope of
Article 3 of the SCM Agreement upon accession.  

These obligations have not been respected. Subsidies are not publicised despite China's commitment to report its subsidies to the WTO (as required of all WTO Members). There is grossly inadequate notification of subsidies provided by central and sub-central governments. Furthermore, China continues to provide prohibited export subsidies and subsidies favouring the use of local products to its domestic industries.  

China also committed to make available to WTO Members, upon request, all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange before such measures are implemented or enforced. In emergency situations, laws, regulations and other measures are to be made available at the latest when they are implemented or enforced. 

Accurate and reliable information was to be provided to individuals and enterprises (in relation to the legislation to be published). All of China trade-related laws, regulations and other measures were to be translated in one or more of the WTO languages (English, French and Spanish). However, China has not honoured these obligations either. There is no transparency in the elaboration, promulgation and implementation of laws and regulations by legislative, judiciary and administrative bodies. No body has been set up to undertake these obligatory translations. 

Commitment No 3: State Owned Enterprises (SOEs) to operate free of State influence  

The Government of China agreed not to influence, directly or indirectly, commercial decisions of SOEs and State-invested enterprises. In particular, under Section 6 of its Accession Protocol, and Article XVII GATT 1994, China agreed that these enterprises would make purchase and sales involving imports or exports based solely on commercial considerations such as price, quality, marketability and availability. However, decisions of State-owned enterprises are not taken on a commercial basis. The 12th Five-year Plan illustrates the GOC control over many industries and SOEs in terms of consolidation, location, access to raw materials, overseas investments, management of capacity and production as well as the market shares for key products.
Moreover, SOEs do not need to be profitable because of government intervention to keep them afloat. SOEs have been directed to build up huge overcapacities without regard to profitability. This has direct consequences on world markets as those overcapacities result in a flood of dumped exports to other countries.

**Commitment No 4: Non-discrimination in Procurement**

Except as otherwise provided for in the Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of:

- the procurement of inputs and goods and services necessary for production and the conditions under which their goods are produced, marketed or sold, in the domestic market and for export;
- the prices and availability of goods and services supplied by national and sub-national authorities and public or state enterprises, in areas including transportation, energy, basic telecommunications, other utilities and factors of production.

China also agreed to join the Government Procurement Agreement (GPA) following accession. China has not joined the GPA, nor has China made a credible offer of activities that would be covered by the GPA commitments.

There is continuing discrimination against imports and foreign companies (FIEs) established in China. FIEs are discriminated in public procurement in various manners. SOEs and public institutions bar FIEs from bidding on public contracts in certain sectors such as the railway market. Regulations exclude FIEs due to ‘licensing requirements’ in the constructions, engineering and design sectors. FIEs are discriminated against on the basis of the country of origin of the supplier. There is no publicity for tenders.

An further example of those measures can be seen in the Steel sector. There is discrimination against foreign equipment and technology imports in the steel sector through the Steel and Iron Industry Development Policy. It encourages the use of local content by stressing the fact that financial support for steel projects using newly developed domestic equipment is provided by the Government of China and should be favoured. The Policy also calls for the use of domestically manufactured steel-manufacturing products and domestic technologies.

**Commitment No 5: Non-discrimination in general**

China agreed to repeal or revise all laws, regulations and other measures inconsistent with the GATT Most Favoured Nation (‘MFN’) and National Treatment rules. China also confirmed that it would comply with the MFN rule with regard to all WTO members.

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60 EZEL S., ATKINTSON R; False promises: the yawning gap between China’s WTO commitments and practices, Information Technology & Innovation Foundation (ITF), September 2015, p.11. See also Annex 5A to the Accession Protocol.
62 False promises: the yawning gap between China’s WTO commitments and practices, p.12.
64 2014 Report to Congress on China’s WTO compliance, p.95.
China has adopted plans to boost innovation in high-technology sectors called the strategic emerging industries. These plans discriminate against foreign firms and their products. They also encourage excessive involvement of the GOC in the market and technology transfer.

In addition, VAT discriminates between domestic goods and imported goods.  

Commitment No 6: Technical Barriers to Trade (TBT)

China shall, upon accession, bring into conformity with the TBT Agreement all technical regulations, standards and conformity assessment procedures.

China has not complied with the TBT Agreement leading to obstacles for foreign companies to access the local market. Certain mandatory industry standards and regulations requiring conformity assessment procedures have not been notified to the WTO while other technical regulations do not fulfill the legitimate objectives defined in the TBT Agreement. China appears to use in-country testing for a range of products which does not conform with international practice that tend to accept foreign tests result and certifications. China continues the development of unique national standards as a means to protect domestic companies from competing foreign technology and standards.

Commitment No 7: Intellectual Property

By accepting the TRIPS agreement, China agreed to comply with generally accepted international norms to protect and enforce IPRs held by foreign companies and individuals.

IPRs are not properly registered and protected. Issues in relation to trade secrets, copyright protection, software piracy, counterfeiting, uncertain and complex enforcement environment due to lack of transparency in the process, procedural obstacles to civil enforcement, local protectionism and, corruption.

Commitment No 8: Market access

China committed to the removal of trade barriers and the opening of the domestic market to foreign companies and their exports in every sector as from the first day of accession.

Market Access Barriers remain. Many barriers to foreign direct investment through the prohibition or restriction to invest in certain sectors, burdensome pre-approval processes for investment (that include registering producers before importation), local content and joint-
venture requirements. National treatment not being extended to Foreign Invested Enterprises ('FIEs'). A ban prohibiting the control by foreign investors of steel companies is in force since 2005.  

Similarly, the mining sector is closed to foreign investment.

Commitment No 9: Non-tariff measures

- China shall eliminate and cease to enforce trade and foreign exchange balancing requirements, local content and export or performance requirements made effective through laws, regulations or other measures.
- China shall ensure that the distribution of import licences, quotas, TRQs, or any other means of approval for importation, the right of importation or investment by national and sub-national authorities, is not conditioned on: whether competing domestic suppliers of such products exist; or performance requirements of any kind, such as local content, offsets, the transfer of technology, export performance or the conduct of R&D in China.

Foreign Invested Enterprises must transfer technology as a precondition for market access. This happens when participating in tenders through the Chinese partner requiring the FIE to transfer technology information before agreeing to form a joint-venture.

Commitment No 10: Judicial review

China shall establish and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

The judicial system in China is not impartial and objective. In this regard, China has not acted in compliance with WTO commitments or China’s own Regulation.

Commitments in relation to specific market sectors:

a) Automotive sector:

Requirements concerning local content, technology transfer and exports will be eliminated upon accession. The right to invest will not be conditioned upon the conduct of R&D.

72 Ibid., p. 224.
73 Protocol of Accession, Part I, Article 7.3.
74 The European Business in China Position Paper 2015/2016, p. 118. In particular, the following sectors are affected by this practice: seed, construction and, the rail industry.
75 Protocol of Accession, Part I, Article 2.(D).(1).
China industrial plans require new automobile and new plants to make substantial investments in R&D facilities in China.\(^77\)

b) Banking sector

China committed to give national treatment to foreign banks within five years following accession. Specific commitments were also made as regards electronic payment services.

This commitment has not been implemented with regard to China-foreign joint banks and bank branches. Foreign credit card and business that issue or accept credit and debit cards face restrictions.\(^78\) A WTO case in relation to electronic payment services discrimination was brought and won by the United States.

c) Telecommunications

China has committed to open the telecommunication market to foreign producers.

The restrictions on basic telecommunications services, including the informal bans on new entry, the requirement to set up a joint-venture with a SOE and, very high capital requirements have prevented foreign suppliers from accessing the telecommunication market services.\(^79\)

d) The film industry

China agreed to liberalise foreign film distribution and to allow a certain number of films to be imported.

After accession, foreign producers were allowed to import less than the number of films committed. This has lead to a WTO dispute won by the United States.\(^80\)

e) Agriculture

China shall upon accession administer TRQs on bulk agricultural commodities should in a transparent manner. China also agreed to be bound by the WTO Agreement on Agriculture which sets out commitments in relation to market access, domestic support and export subsidies. China committed to a cap for trade and production-distorting subsidies that is lower than the cap permitted for developing countries.

The administration of these TRQs is impaired by lack of transparency.\(^81\) China has increased domestic subsidies and other support measures for the local agricultural sector.\(^82\) Sanitary and phytosanitary (‘SPS’) measures, not based on science as required continue to obstruct agricultural trade. Arbitrary inspection on imports constitute further obstacle. All proposed SPS

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\(^77\) False promises: the yawning gap between China’s WTO commitments and practices, pp.13-14.
\(^78\) Ibid., p. 14.
\(^79\) Ibidem.
\(^80\) Ibidem.
\(^81\) 2014 Report to Congress on China’s WTO compliance, p.17.
\(^82\) Ibid., pp.87-88, 91, 97.
measures have not been first notified to the WTO members as required by WTO law.

f) Retail industry

China maintains restraints on the retail of processed oil in breach of its WTO commitments.83

g) Legal services

In adopting measures to implement its legal services commitments, China has triggered WTO compliance issues since they impose an economic needs test and restrict the type of legal services that can be provided. The opening of offices is also characterised by lengthy delays.84

h) The fertilizer industry

Chinas agreed to implement a TRQ system that provides significant market access for three industrial products, including fertilizers.

That TRQ system does not work smoothly due to transparency and administrative guidance concerns. Moreover, discriminatory tax and imports measures have been introduced. US exports of fertilizers to China have declined sharply.85

i) Import and Export Regulations:

China accepted to implement a Trade Defence framework in line with WTO rules. China agreed to substantially reduce or eliminate the vast majority of export restrictions.

Transparency and procedural fairness requirements concerning anti-dumping investigations have not yet been implemented. Trade defence cases are also often initiated as a retaliatory tool. Numerous export restraints have been maintained that have led to two WTO cases, i.e. raw materials and rare earth, defeats against the United States and Europe.86

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83 Ibid., p.18.
84 Ibid., p. 19.
85 Ibid., pp. 36-37.
86 Ibid., pp.15-16.
Across the EUUniverse

Editorial Staff

Giovanni Moschetta
Of Counsel, Rome and Brussels
Coordinator Across the EUUniverse
E-mail: g.moschetta@nctm.it

Bernard O’Connor
Managing Partner, Brussels
Editor Across the EUUniverse
E-mail: b.oconnor@nctm.it

Francesca Angelilli
Associate, Rome
Editorial coordinator Rome
E-mail: f.angelilli@nctm.it

Lorenzo Attolico
Partner, Rome
Responsible for IP
E-mail: l.attolico@ntcm.it

Rocco Panetta
Partner, Rome
Responsible for Privacy & IT Compliance
E-mail: r.panetta@ntcm.it

Alberto Rossi
Partner, Milan
Responsible for Shipping & Transport
E-mail: a.rossi@ntcm.it
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