



EUROPEAN UNION

Brussels, 21 April 2020

Subject: Southern African Customs Union – Safeguard measure imposed on frozen bone-in chicken cuts from the European Union

Request for the establishment of an arbitration panel by the European Union

On 14 June 2019, the European Union launched dispute settlement proceedings with the Southern African Customs Union (SACU) under the Dispute settlement and avoidance Part (Part III) of the Economic Partnership Agreement between the European Union and Southern African Development community (EU-SADC EPA)¹, by requesting consultations pursuant to Article 77 of the EU-SADC EPA concerning safeguard measure imposed by SACU on frozen bone-in chicken cuts from the European Union.

The consultations between the European Union and SACU took place on 13 September 2019 in Gaborone, Botswana with a view of reaching a mutually acceptable resolution of the matter. Unfortunately, the consultations did not lead to the matters being satisfactorily addressed and thus failed to resolve the dispute raised by the European Union. The European Union therefore requests the establishment of an arbitration panel pursuant to Article 79 of the EU-SADC EPA.

The European Union is addressing this request to SACU pursuant to Article 75 (2) of the EU-SADC EPA, according to which SACU and its constituent states (Botswana, Lesotho, Namibia, South Africa and Swaziland) have to act as a collective for disputes which concern collective action of SACU.

The measure at issue is the safeguard measure that was adopted on 27 June 2018 by the SACU Council of Ministers, notified to the European Union on 18 July 2018 and that entered into force on 28 September 2018. The measure at issue concerns the imports of frozen bone-in chicken cuts from the European Union and is based on an alleged increase in the volume of imports into the territory of SACU causing or threatening to cause a disturbance and/or serious injury.

The European Union considers that the measure at issue constitutes a breach of the following provisions of the EU-SADC EPA, as explained below:

1. Article 34 (2) of the EU-SADC EPA, which requires that safeguard measures may be taken if a product originating in one Party is being imported into the territory of another Party or SACU in such increased quantities and under such conditions as to cause or threaten to cause disturbances or serious injury in the territory of SACU. The European Union considers the

¹ Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, signed on 10 June 2016.

measure at issue to be inconsistent with these requirements, *inter alia*, for the following reasons:

- a) The assessment of the existence of a threat of disturbance and/or serious injury as a result of an increase in volume of imports was based on outdated import data;
 - b) The measure at issue was adopted by a different authority from the one which opened the investigation, and on a different legal basis;
 - c) The measure at issue concerns a different geographic scope than the investigation, which did not take into account the import data relating to SACU but was based on data relating exclusively to the Republic of South Africa;
 - d) Other factors such as the volatility of feed raw material prices, the increase in labour costs, diesel, electricity, plastic and cardboard boxes, duties imposed on the soya oilcake used in production of feed and imports from other countries were not appropriately taken into account in the analysis of the existence and level of a threat of disturbance and/or serious injury because of an increase in volume of imports;
 - e) The measure does not take into consideration that the imports during the period December 2016 – September 2018 greatly decreased compared to the period covered by the investigation.
2. Article 34 (2) of the EU-SADC EPA, which provides that safeguard measures can be taken against imports that have increased as a result of the obligations incurred under the EU-SADC EPA. The European Union considers the measure at issue to be inconsistent with these requirements, *inter alia*, for the following reasons:
- a) The alleged increase in quantity of import did not result from obligations incurred under the EU-SADC EPA;
 - b) Any import increase occurred prior to the application of EU-SADC EPA cannot be a result of the obligations incurred under the same agreement.
3. Article 34 (2) of the EU-SADC EPA, which provides that the safeguard measure must not exceed what is necessary to remedy or prevent the serious injury or disturbance. The European Union considers the measure at issue to be inconsistent with these requirements, *inter alia*, for the following reasons:
- a) Other factors such as the volatility of feed raw material prices, the increase in labour costs, diesel, electricity, plastic and cardboard boxes, duties imposed on the soya oilcake used in production of feed and imports from other countries were not appropriately taken into account in the analysis of the existence and level of a threat of disturbance and/or serious injury because of an increase in volume of imports;
 - b) The calculation of the price disadvantage on which the level of the measure is based, does not appropriately take into consideration the different level of anti-dumping duties, which were adopted by SACU against import of bone-in chicken portions from the European Union.
 - c) The measure at issue does not take into consideration that the imports during the period December 2016 – September 2018 greatly decreased compared to the period covered by the investigation.

4. Article 34 (7) (a), (b) and (c) of the EU-SADC EPA, which provides, among others, that (i) situations referred to in Article 34 (2) of the EU-SADC EPA should be referred to the Trade and Development Committee and (ii) all relevant information required for a thorough examination of the case shall be submitted to the Trade and Development Committee (and therefore to the European Union Party). The European Union considers the measure at issue to be inconsistent with these requirements, *inter alia*, for the following reasons:

- a) The Trade and Development Committee (and therefore the European Union Party) was not provided with the necessary data or was provided only with indexed data, which made it impossible to thoroughly and fully examine the situation and propose a recommendation or satisfactory solution.

Therefore, the European Union respectfully requests the establishment of an arbitration panel according to the procedure for the composition of the panel pursuant to Article 80 of the EU-SADC EPA and the relevant provisions of the Rules of Procedure for Dispute Avoidance and Settlement adopted on 19 February 2019 under the EU-SADC EPA (Rules of Procedure), to examine the matter, with standard terms of reference as set out in Article 5 of the Rules of Procedure.

Pursuant to Article 79 of the EU-SADC EPA, this request for the establishment of an arbitration panel is also transmitted to the Trade and Development Committee.

Pursuant to Article 80 of the EU-SADC EPA, each Party shall appoint one arbitrator within ten days of the date of the receipt of the request for the establishment of an arbitration panel. The two arbitrators shall then appoint a third arbitrator, who shall be the chairperson of the arbitration panel, within twenty days of the receipt of the request. If all three or some of the arbitrators are not appointed within the set time limits, or if either Party submits a reasoned written objection to the appointed arbitrators, either Party may request the Chairperson of the Trade and Development Committee to select any remaining member of the panel.

The European Union will submit, by separate correspondence to SACU in the coming days, its proposals for the selection of the arbitrators and an appropriate approach to be presented to the arbitrators as regards remuneration and expenses, pursuant to the rules of the EU-SADC EPA and of the Rules of Procedure. The European Union invites SACU to appoint its arbitrator within the deadline set out in Article 80 and inform the European Union of the appointment accordingly.

Furthermore, the European Union proposes to continue to agree to use English as common working language for the proceedings before the arbitration panel, in accordance with Article 91 of the EU-SADC EPA and Article 15 of the Rules of Procedure.

The European Union looks forward to receiving SACU's reply to this request for the establishment of an arbitration panel and is ready to engage with SACU on the selection of the arbitrators for the arbitration panel and the formalities concerning the next steps.