EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR TRADE

REPORT
TO THE TRADE BARRIERS REGULATION COMMITTEE

Union examination procedure following a complaint on obstacles to trade within the meaning of Regulation (EU) 2015/1843 applied by the United Mexican States consisting of measures affecting the import of 'Tequila'

COMPLAINT SUBMITTED BY THE BREWERS OF EUROPE INDUSTRY ASSOCIATON

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1. EXECUTIVE SUMMARY

On 8 June 2020, the Commission received a complaint under Article 4 of the Trade Barriers Regulation ('TBR') on what was described as an export restrictive measure implemented by Mexico, creating obstacles for one Union importer of 'Tequila' spirit. The complaint claimed that the Mexican measure is inconsistent with Article XI GATT 1994, which *inter alia* prohibits quantitative restrictions on exports. The Commission, after consulting the Trade Barriers Regulation Committee, initiated an examination procedure on 23 July 2020. The notice of initiation was published in the Official Journal of the European Union on 13 August 2020, marking the beginning of the examination period. At the end of this period (that may last up to seven months), the Commission services are obliged to issue a report in the form of a Staff Working Document on the compatibility of the measure with WTO rules or other applicable international trade rules.

1.1. Factual background

The measures at issue have been adopted by the Mexican Consejo Regulador del Tequila ('CRT'). CRT is an association representing the interests of Mexico's Tequila producers, which has been attributed certain powers under Mexican law in order to protect the reputation of the Denomination of Origin 'Tequila'. In essence, CRT is tasked, *inter alia*, with the granting of export certificates to 'Tequila' producers upon ensuring that the relevant 'Tequila' consignment has been produced and commercialised in accordance with technical standards enacted by Mexican legislation. As a conformity assessment body, CRT is under the authority of Mexico's Ministry of Economic Affairs through its regulatory agency, Dirección General de Normas ('DGN').

As of 7 February 2020, CRT refuses to issue export certificates for shipments of one 'Tequila' spirit producer, Tequilas del Senor ('TdS'), to a French company affiliated with Heineken NV named France Boisson Trading. TdS is Heineken's only supplier of 'Tequila'. The 'Tequila' shipments at issue were destined for Klein Wanner, an associate company of Heineken that processes the spirit to produce the Tequila-based flavour for 'Desperados' beer. The reason for the refusal was the alleged breach by TdS and its contractual partner Heineken of the Mexican Official Standard NOM-006-SCFI-2012 ('NOM-006') concerning the production and commercialisation of 'Tequila' spirit. At the core of the alleged breach are the alleged adulteration of 'Tequila' spirit by Heineken in the EU, and the alleged failure of TdS to conclude a co-responsibility agreement with Heineken ensuring compliance with the Mexican technical standard.

The CRT decisions refusing the issue of export certificates were annulled by DGN on 12 November 2020 following an administrative appeal lodged by TdS. The DGN ruling refers to a number of errors in the CRT decisions, including, inter alia that the allegedly contravening behaviour of TdS was not proven and that the sanctions applied were not consistent with internal guidance. Despite this annulment, CRT maintains that they continue to be precluded by the NOM-006 standard from issuing export certificates to TdS. On 19 November 2020, the DGN opened its own investigation into both the actions of TdS and the measures taken by CRT. The decision to open this investigation is currently being challenged by TdS and CRT.

It is noteworthy that Mexico raised on several occasions concerns as regards Heineken and also other operators using the term Tequila at the Spirits Committee

under the EU-Mexico 1997 Spirits Agreement. In autumn 2017, CRT instituted proceedings in the Netherlands and France in order to seek an injunction of sales of Desperados against Heineken, arguing that Desperados violates the Mexican geographical indication (‘GI) ‘Tequila’ under EU law. In 2019, the French court declined its competence and suspended its decision due to the on-going litigation before the Dutch Court. The Dutch court rejected CRT’s request and CRT filed an appeal. A ruling on the appeal is not expected before the fourth quarter of 2021 and it is not excluded that there be a further appeal and/or reference to the Court of Justice.

1.2. Compliance with WTO rules – Legal analysis

Our substantive findings can be summarised as follows:

1. We find that Article XI GATT 1994 could be read as prohibiting all types of export restrictive measures. We do not read that provision or the case-law related thereto as requiring that the measure be enshrined in a wider policy action. We consider that the drafting of Article XI:1 is sufficiently broad as to allow for any action or inaction, even a one-off occurrence, to be considered as a ‘measure’ susceptible to restrict trade.

2. Although the language of Article XI:1 of the GATT 1994 suggests a broad coverage, its scope of application is not unfettered. Article XI:2 in particular restricts the scope of application of Article XI:1 by providing that the provisions of Article XI:1 shall not extend to the areas listed in Article XI:2. Concerning potential compatibility of the Mexican measures with Article XI:2(b), this provision covers, *inter alia*, export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade. The GATT Review Working Party on “Quantitative Restrictions” in 1954-55 affirmed that only those restrictions related to the application of standards or regulations for the classification, grading or marketing of commodities in international trade which go beyond what is necessary for the application of those standards or regulations and thus have an unduly restrictive effect on trade, would clearly be inconsistent with Article XI. In the present case, the refusal to issue export certificates is linked to the ‘use’ of Tequila in the EU, or the failure of the Mexican supplier to conclude an agreement with the EU-importer concerning such ‘use’. There is so far not much relevant WTO jurisprudence as regards the criteria for a defence under Article XI:2(b) GATT 1994. If a panel were to find that ‘use’ of exported spirit in the above sense can be distinguished from the application of a quality standard for the marketing of the exported spirit, the Mexican measures might not be covered by Article XI:2(b).

3. We further analyse a potential defence of the measure under Article XX:(d) of GATT 1994. Our analysis turns on the issue of whether the certificate refusal can be considered necessary. To discharge its burden of proof under the necessity test, Mexico would have to explain the interest pursued by the ‘Tequila’ technical standard regulation, how the refusal to issue an export certificate in this case contributes to furthering this interest, and why there is no alternative, less trade-restrictive measure reasonably available to achieve the same objective. Such a defence appears difficult to sustain. The DGN concluded in its own review of the measure that alternative corrective actions/remedies [original: acción correctiva]

would have been available to CRT upon detecting the alleged breaches of the NOM-006, with subsequent action to be taken. Against this background, it is not obvious that the measure could be considered as ‘necessary’ in the sense of Article XX:(d) of GATT 1994.

4. In consequence, based on the information at our disposal at this stage, we could not conclude that the measure is justified under XX:(d) of GATT 1994. In reaching this conclusion, we underline that the assessment applies only to the measure of refusal of export certificates applied by CRT in this specific case. This should not be read or construed as a determination regarding the WTO compatibility of the Mexican GI system, its ‘Tequila’ technical standard or specific requirements under such standard, such as the need to enter into a co-responsibility agreement.

1.3. Adverse trade effects

Tequila-flavoured beers form part of the market for ‘speers’, i.e. beer with spirit flavours (including vodka, whisky). This market has developed relatively recently and is a fast growth segment in the otherwise saturated beer market. Based on available public data, in 2019 the value of the entire market for Tequila-flavoured beer was several hundreds of millions of Euro. Desperados represents above […]% of the market for Tequila-flavoured speers in Europe.

According to the information provided by the complainant, if the export ban or restriction on Tequila is maintained and Heineken is deprived access in Mexico to a key ingredient for the flavour of Desperados, Heineken risks losing […] Euro in annual sales within the EU alone. It would also trigger redundancies approximated between […] employees in Heineken.

1.4. EU interest

While there could be a potential breach of Article XI GATT 1994, the procedure is rendered more complex by the existence of ongoing national administrative proceedings. Depending on the outcome of the proceedings in Mexico, the measures under review may be finally revoked, affirmed, or replaced by a different measure. As the outcome of those proceedings may thus remove the trade measure or replace it with a different measure, it seems appropriate to await the outcome of the DGN investigation and related litigation in Mexico before taking a final view on whether or not the measure should be challenged before the WTO.

Furthermore, while the trade impact on Heineken NV is undeniable, this is relatively limited when considering the quantity of ‘Tequila’ spirit exported to the EU as a whole[1], both by volume and value. In fact, the Tequila subject to refusal to export represents but […] % of the total volume of ‘Tequila’ exported by TdS to the EU in 2019, and only […]% of the volume of ‘Tequila’ exported by the whole industry to the EU over the same period.

[1] We have no information on the overall volume of Tequila imported into the EU to be used as an ingredient in beers. We have received estimations indicating Desperados represents more than 90% of all ‘speers’ sold in Europe. However, it is not clear whether (all) other speers are using ‘Tequila’ spirit or synthetic aromas as flavouring. No other speer producers intervened in the investigation.

Finally, given the limited impact of the measure in terms of affected EU industry entities and trade volume, launching a WTO action was seen by stakeholders to be counter-productive to our efforts to finalise the negotiation on a modernised free trade agreement with Mexico.

1.5. Conclusion

Article 2.1 of the TBR defines ‘obstacles to trade’ as a “trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action”. On the basis of available evidence, the Mexican measure under investigation appears to be inconsistent with Article XI:1 of the GATT 1994. In view of the limited guidance from relevant WTO jurisprudence, the measure might not be covered by Article XI:2(b). Moreover, from the information that was made available, it cannot be concluded that the measure would be justified under Article XX of GATT 1994.

Nevertheless, given the specific context in which the trade barrier is implemented, and the relevance of national proceedings to the measure under examination, we consider that **an action at the WTO is not in the EU interest**.

Depending on the outcome of the investigation by the Mexican authorities concerning the compliance by TdS and CRT with the applicable legislation, and the reasons underpinning the (revised) measure, the Commission could reconsider its conclusion. We will thus continue to monitor the situation and evaluate the further developments in the Mexican proceedings.

2. INTRODUCTION

2.1. The complaint

On 8 June 2020, the Commission received a complaint under Article 4 of the TBR. The objective of the complaint is to eliminate an allegedly trade restrictive measure applied by Mexico with regards to the export of ‘Tequila’ destined for European brewers. The complaint was filed by the Brewers of Europe (BoE), an association representing the European beer manufacturing sector. Specifically, the measure affected one of the largest members of BoE, Heineken.

The measure consisted of a refusal to issue export certificates by a Mexican Tequila conformity assessment body, CRT, to Heineken’s sole supplier of Tequila, TdS. Heineken use this Tequila to produce a spirit infused beer (or ‘speer’) known as ‘Desperados’. According to the complainant, this dispute began in 2017 with CRT taking issue to the use of ‘Tequila’ spirit in Heineken’s Desperados product and launching litigation in France and the Netherlands.

BoE initiated this complaint alleging that CRT’s formal refusal, dated 7 February 2020, confirmed on 9 March 2020, had created adverse trade effects in the EU and was putting at risk the European ‘speers’ market, which has developed significantly. BoE raised a number of legal issues in their complaint, chiefly concerning breaches of the 1997 EU-Mexico Spirits Agreement and the General Agreement on Tariffs and Trade 1994.

On 23 July 2020, the Commission issued a decision and ruled that the complaint was admissible. On 29 July 2020, the Commission issued a Note Verbale to Mexico informing it about the launch of the investigation. The Notice of Initiation was published on 13 August 2020 in the Official Journal of the European Union[2].

Following the launch of the examination procedure, BoE has supplemented the information on file with a decision of DGN, the supervisory authority of CRT, dated 12 November 2020. BoE also submitted another decision of DGN dated 19 November 2020, whereby DGN launched a new investigation into the actions of TdS and CRT.

2.2. The product

The product under investigation is 'Tequila'. 'Tequila' is a distilled alcohol produced in Mexico, recognised as a Mexican designation of origin product in more than 40 countries. In the European Union, the product has been protected as a geographical indication since 1997.

This investigation also considers a product known as 'Desperados', a spirit-infused pale lager beer produced by Heineken. Specifically, it is, according to Heineken, infused with Tequila exported from Mexico by TdS. It is sold in over 50 countries and has an alcohol by volume content of 5.9%.

2.3. The investigating activity

During the first stage of the investigation, the Commission services gathered information on the products subject to investigation and opened the investigation to potential interested parties. In total, 22 interested parties intervened, mostly representing associations concerned with the protection of European GIs. The Commissions services then issued questionnaires to Mexico and the Brewers of Europe ('BoE') in order to obtain as much relevant information as possible. These questionnaires centred on the following topics for Mexico:

- Domestic legislation of Mexico, specifically technical standard NOM-006
- Role of CRT, its powers and responsibilities
- Exports of 'Tequila' spirit to the EU
- Protection of the 'Tequila' GI in the EU
- Impact of international legislation, specifically notification under the Technical Barriers to Trade Agreement

For BoE, they focused on:

- Trade and employment at stake
- Importation and processing of 'Tequila' spirit

[2] Notice of initiation Union examination procedure following a complaint on obstacles to trade within the meaning of Regulation (EU) 2015/1843 applied by the United Mexican States consisting of measures affecting the import of 'Tequila' 2020/C 265/03, OJ C 265 13.8.2020 p.3

- Impact of the measure adopted by Mexico
- Alleged breaches of GATT 1994 and the 1997 EU-Mexico Spirits Agreement

On the basis of these questionnaires, the Commission services were able to assemble a large quantity of evidence necessary for their investigation. To verify and supplement this information, the Commission services held hearings with CRT, Mexico and BoE, allowing them to explain their positions and answer further questions.

The Commission services wish to stress that the Mexican authorities were fully co-operative throughout the investigation and were willing to reply to all questions. That was also the case for CRT and BoE.

3. THE CHALLENGED PRACTICE AND OBSTACLE TO TRADE

3.1. Chronology and description of the measures at issue

In 1995, Heineken introduced a product called 'Desperados', the first Tequila-flavoured beer in the EU. Heineken purchased 'Tequila' spirit from a certified Tequila-producer, TdS, based in Guadalajara, Mexico. Heineken uses this 'Tequila' spirit to produce an aroma that gives Desperados beer its distinctive flavour.

In meetings of the spirits committee under the 1997 EU-Mexico Spirits Agreement, Mexico raised concerns on the use of the term 'Tequila' by several operators in the EU, including Heineken. According to the provisions of the Agreement (Article 15), each Party may bring information concerning non-compliances.

In the subsequent years, the CRT continued alleging various infringements of the 'Tequila' denomination by the commercialisation of Desperados beer. According to CRT, Desperados infringes the protection due to the 'Tequila' GI. In the fall of 2017, CRT initiated litigation against Heineken before Dutch and French courts to obtain an EU-wide sales prohibition on Desperados. The French Court declined its competence and suspended its decision due to the on-going litigation before the Dutch Court. The Dutch Court rejected CRT's request in May 2019 and CRT filed an appeal with the Amsterdam Court of Appeals. These appellate proceedings are pending. Meanwhile, CRT continued to issue export licenses to TdS for its sales of 'Tequila' spirit to Heineken.

On 7 February 2020, CRT announced it would no longer grant the requisite export certificates to TdS. While referring to 1997 EU-Mexico Spirits Agreement and various Mexican rules, CRT alleged that Heineken's Desperados sales in the EU violate the GI 'Tequila'. TdS first asked CRT to reconsider its decision pursuant to the rules setting out such a recourse. When CRT confirmed its decision to deny the issuance of the export licenses on 9 March 2020, TdS challenged this decision on 31 March 2020 before Mexico´s normalization authority DGN pertaining to the Mexican Ministry of Economic Affairs. On 1 April 2020, TdS also challenged CRT's decision before the Mexican Ministry of Economic Affairs itself.

By administrative decision dated 12 November 2020, the DGN annulled the decision of CRT to refuse issuing export certificates to TdS. In its decision, DGN faults CRT's suspension of export licenses on various grounds:

- the applicable regulations do not confer powers on CRT to suspend the issuance of export licenses (§§34, 46)

- CRT has not proven that the evidence on which it relied has been duly admitted, weighed and declared valid in court proceedings in the Netherlands and France, which are still pending (§38)

- there is no evidence in the file that proves that 'Tequila' produced by TdS under the brand name Sombrero Negro is bottled in bottling plants other than those pertaining to TdS (§41)

- there is no evidence provided by the parties indicating that a legal entity that is a client of TdS and that acquires the 'Tequila' under the brand name Sombrero Negro has the capacity of a bottler, in the case this being the legal entity France Boissons Trading (§42)

- CRT failed to notify or involve the Mexican Ministry of the Economy or the Mexican Institute of Industrial Property ('IMPI') in order to exercise its powers and determine the applicable sanction (§45)

Because of these infringements, DGN indicated that it plans to impose a sanction on CRT (§50).

At the same time as identifying the above evidential and procedural shortcomings, the DGN (at § 51 and 52) claims that TdS may be in violation of a range of Mexican norms, as well as the 1997 EU-Mexico Spirits Agreement, alleging a probable adulteration of TdS's 'Tequila' spirit in the EU. Because of these suspicions, DGN initiated a new investigation on 19 November 2020.

CRT confirmed, in its written comments as well as during the hearing held on 12 January 2021, that it has no plans to resume the issuing of export certificates to TdS. CRT stated that the certification body is required to refrain from issuing such certificates pursuant to sections 6.5.4.2 and 10.5.2 of the NOM-006, when the provisions of the technical standard are not complied with. Both TdS and CRT have challenged the DGN administrative decisions in court and the appeals are pending.

On 7 March 2021, another investigation into TdS's practices was initiated by IMPI. The object of the investigation is to verify the compliance by TdS with the provisions of the Mexican Industrial Property Act. If a breach of the law is found, it may lead to the cancellation of the 'Tequila' GI use authorization of TdS. The investigation is currently ongoing.

3.2. Protection of the Designation of Origin 'Tequila'

The Designation of Origin[3] 'Tequila', which is owned by the Mexican State, is governed by a legal framework for regulating and protecting its use at national and

[3] Appellations/designation of origin are a special kind of geographical indication (GI). GIs and appellations of origin require a qualitative link between the product to which they refer and its place of origin. Both inform consumers about a product's geographical origin and a quality or characteristic of the product linked to its place of origin. The basic difference between the two concepts is that the link with the place of origin must be stronger in the case of an appellation of origin. The quality or

international level. Mexico has indicated the following legal acts as being applicable:

(1) General Declaration of Protection for the Designation of Origin 'Tequila'.

(2) Mexican Official Standard NOM-006-SCFI-2012, Alcoholic drinks - Tequila-Specifications.

(3) Mexican Standard NMX-V-049-NORMEX-2004, Alcoholic beverages containing Tequila-Designation, labelling and specifications.

(4) Mexican conformity assessment policies and procedures. Procedures for certification and verification of products subject to compliance with Mexican official standards, competence of the Ministry of Trade and Industrial Development, published in the Official Journal of the Mexican Federation on October 24, 1997 and its subsequent modifications.

(5) Mexican Industrial Property Act (abrogated), now Federal Industrial Property Protection Act (in force since 5 November 2020).

(6) Mexican Federal Law on Metrology and Standardisation (abrogated), now the Quality Infrastructure Act (in force since 30 August 2020).

(7) Agreement between the United Mexican States and the European Community on the mutual recognition and protection of designations for spirit drinks of 1997, and the updates made to its Annexes on 8 February 2005 and 4 February 2020.

(8) Lisbon Agreement on the Protection of Designations of Origin and their International Registration.

(9) International Registration No 669 of the Designation of Origin 'Tequila' under the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.

In 2019, 'Tequila' was registered as a GI in the EU[4]. The use of spirit GIs in the EU is governed by Regulation (EU) 2019/787[5] on the definition, description,

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characteristics of a product protected as an appellation of origin must result exclusively or essentially from its geographical origin. This generally means that the raw materials should be sourced in the place of origin and that the processing of the product should also take place there. In the case of GIs, a single criterion attributable to geographical origin is sufficient – be it a quality or other characteristic of the product – or even just its reputation.

[4] Commission Regulation (EU) 2019/335 of 27 February 2019 amending Annex III to Regulation (EC) No 110/2008 of the European Parliament and of the Council as regards the registration of the spirit drink 'Tequila' as a geographical indication, C/2019/1493, OJ L 60, 28.2.2019, p. 3

[5] Regulation (EU) 2019/787 of the European Parliament and of the Council of 17 April 2019 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages, and repealing Regulation (EC) No 110/2008, OJ L 130, 17.5.2019, p. 1

presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages..

3.3. ‘Tequila’ Technical Regulations: Mexican Official Standard NOM-006-SCFI-2012

The NOM-006 Alcoholic drinks Tequila-Specifications, was published in the Diario Oficial de la Federación (official means of communication for the public administration in Mexico) on 13 December 2012, which entered into force on 11 February 2013[6].

Paragraph 10.7 of NOM-006 provided that in the event of attempted use of a brand or any other distinctive sign for ‘Tequila’ according to applicable legislation, standardization or regulation in the place of commercialization, other than those to which the Authorized Producer is owner or beneficiary, or when the ‘Tequila’ is bottled by someone other than the Authorized Producer (e.g. because it was sold in bulk), a ***joint responsibility agreement*** (also referred to as co-responsibility agreement) must be filed with the IMPI for registration pursuant to this Official Mexican Standard and with the Industrial Property Law.

In that context, Article 308 of the Federal Law on the Protection of Industrial Property provides that the authorised user of a protected designation of origin or geographical indication may, by agreement, allow the use of the protected designation of origin or geographical indication only to those who distribute or sell the products of its brands. The agreement must be registered with the Institute in order to produce effects to the detriment of third parties from the date of registration. A similar provision was provided for in Article 165a 24 of the previous Industrial Property Law.

The approved bottler must also comply with the labelling requirements set forth in Chapter 11 of NOM-006 without prejudice to compliance with the requirements imposed by the laws of the country to which the product is exported.

The CRT provided a few standard examples of co-responsibility agreements, in particular concerning ‘Tequila’ spirit sold in bulk which they argue is the case of the ‘Sombrero Negro’ Tequila spirit sold by TdS to Heineken’s affiliate, France Boisson Trading. The examples refer to the obligation of the bottler to respect the NOM-006 standard concerning the traceability, mixing of the spirit (e.g. only mixing with water is allowed) and labelling. The producer and the bottler are also jointly responsible to provide all the information requested by CRT in order to confirm that the technical standard is complied with.

3.4. Mandate and powers of the Tequila Regulatory Board (Consejo Regulador del Tequila or CRT)

The powers of the CRT as the Certification Body were regulated by the Federal Law on Metrology and Standardisation (‘LFMN’), which was in force during the course of the matter under review, by articles 68, 70, 73 and 74: Similarly, Article 53 of the

[6] The Mexican authorities provided a link to the latest EN version available here: https://www.crt.org.mx/images/documentos/Normas/NOM_006_SCFI_2012_Ingles.pdf

Law on Quality Infrastructure ('SCI'), which repealed the LFMN and is currently in force since 30 August 2020, provides that bodies responsible for carrying out conformity assessment in Mexico with respect to Mexican Official Standards may be laboratories for testing and testing, measuring or calibration, inspection units, certification bodies and other suppliers and service providers.

In the case of Tequila, the conformity assessment of Mexican Official Standard NOM-006 is carried out by CRT, which is approved by the DGN to carry out these functions, as well as accreditation as a certification body by the Mexican Accreditation Entity ('EMA').

In accordance with Article 60 of the SCI, conformity assessment activities must comply with the rules, procedures and methods laid down in the Mexican Official Standards. Therefore, in exercising its powers as conformity assessment body, the CRT must act in accordance with the provisions of NOM-006. The powers granted to the CRT by NOM-006 include to issue export certificates for 'Tequila' spirit (section 6.5.4.2).

In accordance with the LFMN and its own by-laws, the CRT's main objectives are:

(1) Guarantee to the consumer the authenticity of 'Tequila' and beverages that contain 'Tequila'.

(2) Verify and certify compliance with the Official Mexican Tequila Standard.

(3) Safeguard the Denomination of Origin 'Tequila' both in Mexico and abroad.

(4) Provide timely and accurate information to the Agave-Tequila production chain.

By letter dated 17 October 2017, IMPI provided an official statement regarding the powers of CRT in the context of the two litigations in France and the Netherlands concerning the commercialisation of Desperados. According to this statement, CRT has been mandated by IMPI, an agency of the Mexican Ministry of Economic Affairs, to enforce the GI 'Tequila' against fraud and abuse around the world. Within the context of this mandate CRT filed the application to register the GI 'Tequila' under EU law with the Commission in 2013, which, as mentioned, was obtained in 2019. Within this mandate, CRT also initiated, in 2017, the above-mentioned litigation against the sale of Heineken's Desperados before Dutch and French courts.

3.5. Potential justifications of the measures

In its reply to the questionnaire of the Commission Services, Mexico does not invoke any justification beyond the need for TdS to comply with national legal provisions, in particular the NOM-006 requirements regarding concluding a co-responsibility agreement. In its submission to the Commission, CRT indicates that the measures are covered by Article XI:2(b) GATT 1994. In the meeting between the complainant and Mexico held on 13 January 2021, Mexico referred to the defence under Article XI:2(b) GATT as justifying the measure.

In addition, and given that the aim of the measure seems to be to insure compliance with national technical regulations that have been enacted to insure the overall protection of consumers of the spirit 'Tequila', it is not excluded that Mexico would also attempt to invoke Article XX:(d) GATT to justify its measure.

3.6. Legal analysis

3.6.1. Compliance with the GATT 1994 Article XI on general elimination of quantitative restrictions

In order to establish whether the measure is inconsistent with Article XI GATT 1994, the report must analyse the following elements: (i) whether the measure is instituted by a contracting party; (ii) whether the measure constitutes a prohibition or restriction on the importation or on the exportation or sale for export of any product and (iii) whether the exclusions in Article XI:2(b) apply.

Article XI of the GATT 1994 states that:

(1) No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

(2) The provisions of paragraph 1 of this Article shall not extend to the following:

(...)

(b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

3.6.1.1. Is the denial of export certificates by CRT a Government measure?

CRT is a non-profit civil association, which acts as an interprofessional institution as well as a body to which the Mexican Government has attributed certain powers under public law. In particular, CRT is exercising powers conferred upon it under Articles 69 and 70 of the LFMN and the technical standard NOM-006.

According to the statement of IMPI submitted as part of the complaint documents, CRT has been mandated to enforce the GI 'Tequila' against fraud and abuse around the world. Additionally, CRT has been mandated by DGN to assess the conformity of the production and commercialisation of Tequila with the technical requirements of NOM-006. Within this context, CRT has been issuing export certificates to 'Tequila' spirit destined for consumption abroad.

It is without a doubt that, by virtue of the legal regime instituted by the LFMN and the NOM-006 standard provisions, the export of the spirit 'Tequila' cannot take place in the absence of a certificate of conformity issued by CRT. Given that both the mandate of CRT and the certificate requirement for exportation stem from provisions of national law, it can be argued that the measure to refuse the granting

of export certificates to TdS, and the resultant inability of TdS to export 'Tequila' spirit to Heineken's affiliate in France, are imputable to the Mexican state.

3.6.1.2. Is the denial of export certificates a quantitative restriction?

The Panel in *India – Quantitative Restrictions*[7], set out the scope of the concept of "restriction": *"[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges '.As was noted by the panel in Japan – Trade in Semi-conductors, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'.*

It seems to us clear that a refusal to grant a conformity certificate that is a prerequisite for the exportation of the spirit 'Tequila' falls within the scope of '*export licenses or other measures'*. We do not read the above jurisprudence as requiring that the measure be enshrined in a wider policy action. We consider that the drafting of Article XI:1 is sufficiently broad as to allow for any action or inaction, even a one-off occurrence, to be considered as a 'measure' susceptible to restrict trade.

In *China – Raw Materials*[8], the Appellate Body examined the concepts of "*prohibition*" and "*restriction*" and concluded that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported. As the exportation of the 'Tequila' spirit to Heineken is rendered impossible due to the lack of appropriate certificates, we consider that this measure effectively reduces the amount of 'Tequila' spirit being exported to the EU. On this basis the measure adopted by CRT appears to be inconsistent with Article XI:1 of the GATT 1994.

3.6.1.3. Could the restriction be excluded under Article XI:2 (b)?

The Panel Report on *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*[9] examined, inter alia, the claim of Canada that its regulations prohibiting the exportation of some unprocessed fish were permitted under Article XI:2(b), as the fish were "commodities" and the regulations dealt with "standards" and "marketing". Following from this report, for a restrictive measure to be justified under this narrow exception, the measure should concern (i) standards … for the marketing of commodities in international trade and (ii) be necessary for the application of such standard.

According to the Oxford online dictionary (https://www.oed.com/view/Entry/37205?redirectedFrom=commodity#eid), the

7 Panel Report, India – Quantitative Restrictions, para. 5.129.

8 Appellate Body Report in DS 394, China-Raw materials.

9 Panel Report, Canada — Measures Affecting Exports of Unprocessed Herring and Salmon, document L/6268.

contemporary meaning of 'commodity' is defined as "a thing produced for use or sale; a piece of merchandise; an article of commerce; in later use frequently spec. a raw material, primary product, or other basic good which is traded in bulk and the units of which are interchangeable for the purposes of trading". While 'Tequila' spirit would not qualify as a raw material or primary product as it is a processed agricultural product from the Agave plant, it would likely fit the broader definition of a merchandise and article for commerce.

Interestingly, the Review Working Party on "Quantitative Restrictions" in 1954-55 considered various proposals to amend Article XI:2 GATT and agreed that the exception in paragraph (b) would permit an Australian butter marketing scheme, hence a measure concerning another processed agricultural product[10].

Furthermore, as the refusal to issue conformity certificates is a consequence of the application of the Mexican Tequila technical standard, which concerns both production and commercialisation (e.g. labelling) of the 'Tequila' spirit in Mexico and abroad, the measure seems to concern a standard for the marketing of the 'Tequila' spirit. At the same time, the refusal to issue the export certificates refers to the use of 'Tequila' spirit following its exportation, and not the intrinsic qualities or application of quality standards for the spirit to be exported. If 'use' of the exported spirit in this sense can be distinguished from the application of a quality standard for the marketing of the exported spirit, the Mexican measures might not be covered by Article XI:2(b).

3.6.1.4. Justification under Article XX:(d) of GATT 1994

We have concluded above that the measure appears to be inconsistent with Article XI of GATT 1994 and might not be covered by Article XI:2(b). In order to examine the compatibility of that measures with Mexico's obligations under GATT 1994, it is further appropriate to assess whether the measures could be justified under the general exceptions provision of Article XX GATT 1994. This is without prejudice to the fact that it would be for Mexico to invoke Article XX and carry the burden of proof that the conditions for justifying its measure pursuant to that provision are met.

Mexico could argue that the measure is covered by paragraph (d) of Article XX regarding the respect of "laws or regulations", in particular as regards the respect of patents, trademarks and copyrights or other deceptive practices.

Article XX:(d) of the GATT 1994 provides that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(...)

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to

[10] EPCT/A/PV/19, pp. 8-10.

customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

In *Thailand – Cigarettes (Philippines)*[11], the Appellate Body held that a WTO Member raising a defence under Article XX:(d) has to prove three key elements: (i) that the measure at issue secures compliance with "laws or regulations" that are not themselves inconsistent with the GATT 1994; (ii) that the measure at issue is "necessary" to secure such compliance; and (iii) that the measure at issue meets the requirements set out in the chapeau of Article XX. These conditions are cumulative, and failure by Mexico to establish that any one of these conditions is met would be sufficient for a defence under Article XX to fail.

The complainant argues that Mexico's refusal to issue certificates is completely outside the scope of Article XX:(d) as this legal basis does not concern the application of a national legislation imposing obligations on operators outside Mexico. Furthermore, it argues that the measure is not necessary as alternative enforcement paths are being pursued in parallel in EU courts. This brings forward the legal question of the scope of Article XX:(d) and in particular the interpretation of the notion of 'laws and regulations'.

3.6.1.5. Is the NOM-006 a 'law or regulation' within the meaning of Article XX:(d)?

It is our reading that the 'Tequila' technical standard NOM-006 could be considered a "regulation" under Article XX:(d) GATT as it is a mandatory rule concerning the use of the 'Tequila' GI, part of Mexico's legal system.

In *Mexico – Taxes on Soft Drinks*[12] the Appellate Body considered that the term "laws or regulations" in Article XX:(d) meant "*rules that form part of the domestic legal system of a WTO Members*". Although finding that this term did not include obligations of another WTO Member under an international agreement, the Appellate Body did consider that "laws or regulations" could include international rules incorporated into or having direct effect within the domestic legal system of a WTO Member.

However, in that case the Appellate Body rejected Mexico's interpretation of the terms "laws or regulations" in Article XX:(d), as including international obligations of another WTO Member. This would imply that a WTO Member could invoke Article XX:(d) to justify measures designed "to secure compliance" with another Member's WTO obligations, contrary to Articles 22 and 23 of the DSU and Article XXIII:2 of the GATT 1994.

Finally, according to the above Appellate Body report, even if Article XX:(d) applied to only international agreements other than the WTO agreements, Mexico's interpretation would mean that, in order to examine whether a measure is justified under that provision, panels and the Appellate Body would have to determine whether the relevant non-WTO international agreements have been violated, which is not the function they are intended to have under the DSU.

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[11] Appellate Body report in DS 371 Thailand – Cigarettes.

[12] Appellate Body report in DS 308 Mexico – Taxes on Soft Drinks.

Therefore, ”laws or regulations” within the meaning of Article XX:(d) refer to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of another WTO Member. It follows that Mexico cannot invoke a potential failure by the EU to comply with the TRIPS provisions (e.g. Article 23 regarding the additional protection for Geographical Indications for Wines and Spirits) or the 1997 EU-Mexico Spirits Agreement as a justification for its restrictive measure. On the other side, rules that form part of Mexico’s domestic legal order can be invoked to the extent that they are not inconsistent with the GATT 1994.

After finding that Mexico can only invoke compliance with its national regulations to justify the measure, we should clarify whether the Mexican technical standard NOM-006 is consistent with the covered agreements.

3.6.1.6. Is the Tequila technical standard consistent with GATT 1994 and other covered agreements?

The ‘Tequila’ technical standard NOM-006 contains a number of requirements regarding the bottling, blending, traceability and labelling. By providing detailed rules applicable at different stages of the ‘Tequila’ production process, including as to the use of the final product, the technical specifications provide a very high level of protection for Mexico’s most famous GI.

By comparison, similar strong protection (going beyond the production stage) is enjoyed by a number of well known EU spirit GIs like Cognac, by virtue of both national GI law and European law. In particular, the EU’s Spirit Regulation[13] covers aspects such as labelling requirements in order to avoid undue exploitation of the reputation of a GI in the EU. Therefore, some conditions on the use of the GI post-production are accepted also at European level.

The GATT 1994 does not prescribe a particular level of protection for IP rights. In Articles 22 and 23 of the TRIPS Agreement apply in particular to GIs and set minimum standards of protection. According to Article 22(2):

In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

Article 23(1) refers to an additional protection for wine and spirits GIs:

[13] Regulation (EU) 2019/787 of the European Parliament and of the Council of 17 April 2019 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages, and repealing Regulation (EC) No 110/2008, OJ L 130, 17.5.2019, p. 1.

Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or ***identifying spirits for spirits not originating in the place indicated by the geographical indication*** *in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.*

At the same time, Article 1.1 of the TRIPS Agreement states that Members may implement in their law more extensive protection than is required by the TRIPS, provided that such protection does not contravene the provisions of this Agreement. (our emphasis)

By regulating on the bottling, labelling and blending of 'Tequila' spirit drink, Mexico appears to go beyond the additional protection referred to in Article 23. However, a higher level of IP protection is allowed under Article 1.1 TRIPS. Therefore, countries may go beyond the threshold established in Article 23 in order to avoid undue exploitation of the GI's reputation.

The complaint claims that the extraterritorial restrictions CRT is seeking to impose on Tequila are not countenanced by any internationally accepted rule on GI protection and go beyond the TRIPS requirements. However, the complaint does not give any additional reference on why this would be inconsistent with the covered agreements.

Based on the information at our disposal, we have not identified provisions of the 'Tequila' technical standard NOM-006 that would appear to be in breach of either the GATT 1994 or the TRIPS Agreement.

3.6.1.7. Is the refusal of export certificate a measure designed to secure compliance with the Tequila technical standard?

Noting that there is no justification under Article XX:(d) for a measure that is not designed "to secure compliance" with a Member's laws or regulations, the Appellate Body in *Mexico – Taxes on Soft Drinks*[14] then held, contrary to the Panel, that a measure can be said to be designed "to secure compliance" even if the measure cannot be guaranteed to achieve its result with absolute certainty and that the "use of coercion" was not a necessary component of a measure "designed to secure compliance".

The refusal of issuing export certificates is a consequence of the alleged failure by TdS to demonstrate to CRT compliance with the requirements of the national technical standard concerning its commercial relationship with France Boisson Trading, a subsidiary of Heineken. On this basis, the objective of the measure would therefore appear to be to secure compliance with the NOM-006 standard.

It must be noted, however, that in the administrative decision of DGN, the objectionable conduct of TdS is not considered as sufficiently demonstrated, as the evidence invoked concerns the use of the 'Tequila' spirit by Heineken in Europe. DGN subsequently ordered its own investigation into allegations of misconduct by TdS, the results of which are still outstanding. Given that by DGN's own findings

[14] Idem 18.

the alleged non-compliance of TdS was not sufficiently established by CRT, and that DGN's own investigation has not yet produced any results, it may therefore be questioned whether the measure can in fact be regarded as being designed to secure compliance. It is not clear how the measures could be designed to ensure compliance with the NOM-006 standard if no failure to comply with that standard has been established to the satisfaction of the Mexican authorities themselves.

In any event, even if we were to reach the conclusion that the measure could be regarded as being designed to secure compliance with the NOM-006 standard, that measure would have to be demonstrated as being 'necessary' to that end.

3.6.1.8. Is the measure necessary to secure compliance with the Tequila technical standard?

In applying the 'necessity' test, the Appellate Body in *Korea – Various Measures on Beef*[15] and, subsequently, in *EC Asbestos*[16] considered the importance of the value or interest pursued by the laws with which the challenged measure sought to secure compliance, whether the objective pursued by the challenged measure contributed to the end that was sought to be realized, and whether a reasonably available alternative measure existed.

To discharge its burden of proof under the necessity test, Mexico would have to explain how the refusal to issue an export certificate contributes to achieving the objective of securing compliance with the Tequila technical standard NOM-006, and why there is no alternative, less trade-restrictive measure to ensure enforcement (under the chapeau of Article XX).

To the Commission services, a defence built around the elements enumerated above would not appear to be straightforward. In the course of the investigation, Mexico has not put forward any reasoning as to why the contested measure was necessary in the sense of Article XX:(d), or why indeed it did not opt for a less trade-restrictive alternative. .

As regards the first point, we note that at this point it is unclear whether TdS in fact failed to comply with the NOM-006 standard. Even if the measure were to be considered as designed to secure compliance with that standard, the extent to which the measure actually contributes to that objective is unclear.

Even if we considered that the measure made a contribution to achieving that objective, it appears that less trade-restrictive alternatives were reasonably available to Mexico.

To start, the DGN administrative decision dated 19 November 2020 itself suggests that alternative, less restrictive actions, would have been available to CRT upon detecting the alleged breaches of the NOM-006 by TdS. In particular, according to DGN the appropriate corrective action applicable to the alleged NOM-006 breaches would have consisted of the suspension for 30 calendar days of the Standard Compliance Certificate and/or the Agave Product Registry, as well as the notification to the Mexican Ministry of the Economy, for the purpose of becoming

[15] Appellate Body report in DS 161 Korea – Various Measures on Beef.

[16] Appellate Body report in DS 135 EC-Asbestos.

aware of the alleged irregularities and proceeding with the application of the corresponding sanctions[17]. The DGN notes:

'*45. In this regard, from the records contained in the file, it is conclusive that the CRT resolution consisting of the definitive suspension or cancellation in the issuance of export certificates in favour of TDS with respect to the product Tequila Sombrero Negro, does not adhere to the provisions of the General Criteria referred to in advance, by virtue of the fact that the aforementioned Council did not apply the corrective action and the action derived from the case in question and failed to notify or involve this Ministry of the Economy or the Mexican Institute of Industrial Property in order to exercise its powers and determine the applicable sanction in terms of the provisions of the Federal Law on Metrology and Standardisation, as well as the Industrial Property Law*.'

Furthermore, considering the document DGN.31201.2019.4818 entitled 'Criterios generales en materia de certificacion propuestos por el Consejo Regulador del Tequila' issued by DGN and submitted by Mexico in the investigation, there is no sanction to be taken by CRT that consists in the indefinite refusal to issue certificates for 'Tequila' spirit destined to a particular buyer, which is what has been applied by CRT in this case.

The sanctions identified by DGN in the administrative decision, i.e. a temporary suspension, would have been less trade-restrictive than the contested measure, i.e. the indefinite refusal to issue export certificates lasting already for more than a year. The fact that this less trade-restrictive alternative is identified by DGN itself as the appropriate remedy seems to suggest that it was reasonably available, and no evidence to the contrary has been presented. Indeed, the fact that the relevant Mexican rules do not vest authority in CRT for an indefinite refusal to issue export certificates in the present case would cast doubt on any claim that just such an indefinite refusal was in fact necessary to secure compliance with the underlying norm, i.e. NOM-006.

In light of these considerations, it is not clear that Mexico would be able to discharge its burden of proof in respect of the necessity of the contested measure in the sense of Article XX:(d) of GATT 1994. Given that the necessity of the measure is one of the cumulative conditions under Article XX:(d), the failure to establish that necessity must result in a finding that the measure is not justified under that provision. Accordingly, should Mexico not be able to prove the necessity of the measure, there would then be no need to address any of the remaining conditions to dispose of a possible defence of Mexico under Article XX:(d).

3.6.2. Conclusion on obstacle to trade

Article 2.1 of the TBR defines 'obstacles to trade' as a "trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action. Such a right of action exists when international trade rules either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question."

[17] Paragraph 44 of the DGN Decision dated 19 November 2020.

On the basis of available evidence, the above analysis suggests that the Mexican measure under investigation appears to be inconsistent with Article XI:1 of the GATT 1994. In view of the limited guidance from relevant WTO jurisprudence, the measure might not be covered by Article XI:2(b). Moreover, from the information that was made available, it cannot be concluded that the measure would be justified under Article XX:(d) of GATT 1994. On this basis, there would seem to be evidence of an obstacle to trade in the sense of Article 2.1 of the TBR.

4. ADVERSE TRADE EFFECTS

4.1. Definition

Article 2.1 of the TBR defines 'adverse trade effects' as "those which an obstacle to trade causes or threatens to cause, in respect of a product or service, to Union enterprises on the market of any third country, and which have a material impact on the economy of the Union or of a region of the Union, or on a sector of economic activity therein; the fact that the complainant suffers from such adverse effects shall not be considered sufficient to justify, on its own, the Union institutions proceeding with any action."

The final sentence of this definition, as will be shown below, has strong significance in this case. It is important that the demonstrated adverse trade effects not only impact the complainant but have a wider, material impact on the European Union.

4.2. Trade effects claimed by BoE

The TBR complaint submitted by BoE includes a detailed statistical analysis on the adverse trade effects suffered by Heineken and, according to BoE, the European Union.

The data submitted by BoE and provided by Heineken was sourced from the analytics company GlobalData. By BoE's own admission, such data does not cover all 'Tequila' flavoured beer in the EU, there is no access to brand specific value, only an approximate estimation. Nevertheless, BoE's claim suggests clear and material adverse effects on Heineken. According to the submitted data, Desperados accounts for approximately […]% of the entire EU market for tequila flavoured beer[18] and the market grows at an average rate of approximately […]% per year. Furthermore, as of 2019, Desperados' turnover was of approximately […]. BoE asserts that the loss of Desperados would represent a loss of […] euros to Heineken and damage a growing EU market.

Concerning redundancies, BoE submits that for Heineken, there is a risk of making between […] jobs redundant across Heineken's global operations, with a risk of up to […] of those jobs within the EU. BoE also estimates that the European beer brewing industry employs approximately […] people, with a further […] jobs in the supply sector depending on beer production (ranging from agriculture to marketing, which is relevant should the measure at hand impact other manufacturers). BoE has used the same calculation with Heineken with these broader figures from the EU, estimating an approximate number of […] jobs in the wider EU industry as being at risk of redundancy.

4.3. Impact on the European Union

[18] According to 2018 figures, does not include some large producers.

While BoE's data suggests adverse trade effects for Heineken, there is little tangible evidence of a material EU-wide impact. We have not received any data from other 'speer' manufacturers that shows a negative trade impact to the industry, including from interested parties in the case. Although BoE's data is detailed, the EU-wide references reflect the existence of a potential risk rather than actual adverse trade effects to the European beer manufacturing industry. BoE's data is concrete in the coverage of Heineken's potential losses but constitutes an estimation of risk when it comes to the European beer industry. Furthermore, although their analysis shows a risk of redundancies affecting Heineken (a large part being located in the EU), their analysis of redundancy risk in the EU wide industry is, by their own admission, an extrapolation of Heineken's data applied to an estimate of jobs in the industry.

It is important to note that TdS still retains export certificates from CRT for their other EU-based clients. 'Tequila' spirit drink is still exported through TdS and other manufacturers to EU operators. CRT, in their hearing with the European Commission, have made it clear that their interest is not in limiting 'Tequila' exports to the EU. As such, BoE's estimation of the adverse effects on trade for the EU market constitutes an inferred estimation.

5. EU INTEREST

In light of the considerations set out in this section, taken together, we consider that an action at the WTO is **not in the EU interest**.

The following reasons are relevant in this context.

5.1. Lack of systemic effect

While the trade impact on Heineken is undeniable, this is relatively limited when considering the quantity of Tequila exported to the EU as a whole, both by volume and value.

According to information provided by CRT, the Tequila subject to refusal to export represents but […]% of the total volume of 'Tequila' exported by TdS to Europe in 2019 and only […]% of the volume of 'Tequila' exported by the whole industry to Europe over the same period.

Furthermore, no interested parties have submitted further economic data in support of a wider impact of the measure on the EU market, despite other speers producers being active on the EU market. Also, we do not have targeted data for 'Tequila' spirit imported in the EU with the aim of incorporating it as an ingredient in a beer as such a procedure would not be in principle allowed by the Mexican technical standard. Three national brewers associations have intervened by supporting the action in general terms but without providing information on potential economic injury following the implementation of the measure.

Also, export certificates are continuing to be issued to TdS for other European importers. Heineken and TdS have also challenged the matter in national courts and are pursuing a number of avenues that, if successful, would lead to the issuing of export certificates to resume.

5.2. Parallel national court proceedings on the compliance with EU GI legislation

As indicated in the analysis, there are two pending litigations in European courts. The procedure in France is suspended while the procedure in the Netherlands is pending at the level of the Court of Appeals in Amsterdam. A ruling is expected during 2021. Additionally, there are court challenges pending in Mexico regarding the two decisions issued by DGN on 12 and 19 November 2020 brought by both CRT and TdS as well as an administrative investigation initiated by IMPI on 7 March 2021.

The legal matter pending in the EU courts is different from the subject of this report. The findings in the national courts are however essential in order to determine if Heineken and its affiliates are acting in compliance with EU GI rules on spirits, some of which incorporate by reference the Mexican technical standards concerning 'Tequila' spirit. More specifically, the Commission has recognised that "[r]estrictions on commercial arrangements between suppliers and bottlers … are justified with regard to the need to ensure traceability and prevent fraud", and in that context refers specifically to the requirement of concluding a co-responsibility agreement.[19]

Considering that one of the reasons cited by CRT for refusing to issue export certificates to TdS in respect of its sales to Heineken and its affiliates is the alleged adulteration of 'Tequila' in the EU, the outcome of the pending court proceedings in the Netherlands and France could have an impact on the further application of the contested measure.

More importantly, the pending investigations and litigation in Mexico could result in the repeal, substantive modification, or confirmation of the measure adopted by CRT. We therefore find it particularly difficult to propose concrete steps towards a WTO case considering that the factual situation and the validity of the legal act at the basis of the measure, are still being disputed.

5.3. Current trade negotiations with Mexico on the conclusion of a Comprehensive Trade Agreement

The EU is currently engaged with Mexico in the finalisation of a negotiation on a modernised free trade agreement. A crucial part of the negotiations has been the conclusion of a far-reaching chapter on Intellectual Property Rights, including extensive protection for a list of 340 EU GIs. Given the limited impact of the measure in terms of affected EU industry entities, launching a WTO action could be counter-productive to our efforts to finalise the agreement and conclude an ambitious GI chapter.

6. COURSE OF ACTION

Article 2.1 of the TBR defines 'obstacles to trade' as a "trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action". On the basis of available evidence, the Mexican measure under investigation appears to be inconsistent with Article XI:1 of the GATT 1994. In view of the limited guidance from relevant WTO jurisprudence, the measure might not be covered by Article XI:2(b) either. Moreover, from the information that was made available, it cannot be concluded that the measure would be justified under Article XX:(d) of GATT 1994. On this basis, there would seem to be evidence of an obstacle to trade in the sense of Article 2.1 of the TBR.

[19] See recital 15 of Commission Regulation (EU) 2019/335 of 27 February 2019 amending Annex III to Regulation (EC) No 110/2008 of the European Parliament and of the Council as regards the registration of the spirit drink 'Tequila' as a geographical indication, *OJ L 60, 28.2.2019, p. 3.*

Nevertheless, given the specific context in which the trade barrier is implemented and the relevance of national proceedings to the measure at issue, we consider that **an action at the WTO is not in the EU interest**.

Depending on the outcome of the various pending court procedures and investigations in Mexico, the Commission could reconsider its analysis. We would thus continue to monitor the situation and evaluate the further developments in the Mexican proceedings.