EUROGROUP FOR ANIMALS

Policy Brief

METHOD-OF-PRODUCTION LABELLING: THE WAY FORWARD TO SUSTAINABLE TRADE

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1 INTRODUCTION

As a result of the proliferation of industrial farm animal production on the one hand and growing global crises such as climate change and antimicrobial resistance on the other, food sustainability – including animal welfare – has become an increasingly important item on a long list of pressing concerns for people around the world. However, consumers may find it hard to act on these concerns due to the lack of information on the methods of production for animal products.

With over half of EU citizens expressing willingness to pay more for high welfare, and therefore more sustainable products,[1] a mandatory 'method-of-production' label on the farming of animals used for food could enable consumers to make informed purchasing decisions. Such a label could also eventually lead to farmers favouring methods of production that are the least detrimental to the planet, the animals and consumers, thereby hastening a transition towards more sustainable and humane farming systems. Given the correlation between farm animal welfare standards and higher food safety levels, the use of fewer antibiotics, a lower carbon footprint, and even the quality of labour conditions of workers involved in the food production chain, mandatory method-of-production labelling would also contribute to achieving the UN Sustainable Development Goals (SDGs).[2] Last but not least, mandatory method-of-production labelling for animal products would contribute to leveling the EU market's playing field.

This policy brief first explores the characteristics of an optimal method-of-production labelling system. Then, because WTO rules are often brandished as an obstacle to progress in the area of labelling,[3] this paper studies the

[1] European Commission, *Special Eurobarometer 442: Attitudes of Europeans towards Animal Welfare*, 48, 2015

[2] Eurogroup for Animals (et al.), *Achieving the sustainable development goals: the role of animal welfare in trade policy*, October 2018, available at: https://bit.ly/2ktJixe, https://bit.ly/2ktJixe

[3] Notably in the case of products derived from cloned animals (see *infra*).

compatibility of such a system with WTO rules in light of the most recent case law. Only in 2009 did the European Commission address the issue of the compliance of a method-of-production label for animal agricultural goods with WTO rules. The study concluded that "it [was] not possible to predict whether a mandatory animal welfare standard could be successfully challenged and, thus, become incompatible with WTO law."[4] However, much has changed in ten years, and the case law indicates that such a label would now comply with the EU's obligations under WTO rules, especially as it relates to the Technical Barriers to Trade (TBT) Agreement.

[4] European Commission, *Feasibility Study Part 1: Animal Welfare Labelling*, 34, 2009, available at: https://bit.ly/2ktKX5W

2 WHY SUCH A LABEL?

2.1 ENSURING A LEVEL PLAYING FIELD ...

Despite being considered a leader in farm animal welfare regulations, and despite the progress made in the field of animal welfare science, the EU has failed to enact any new legislation on farm animal welfare for the past 10 years. In addition, many species are still not protected by any specific set of legislation. The last decade was also a period during which the EU became proactive on international trade.

Currently, the EU is negotiating more than 15 trade agreements, all aimed at opening its agri-food market to some extent. So far, the EU does not impose any of its animal welfare standards on imported goods, except its standards related to slaughter. Nor has the EU included any conditional trade preferences based on animal welfare standards in its free trade agreements.

There is clearly no level playing field, which affects EU producers. Except for some agricultural products originating from New Zealand, most imports are produced under lower animal welfare standards, thus more cheaply, and sold for cheaper on the EU market. For instance, imported chicken roughly amount to 6% of the EU chicken market,[5] coming mostly from Brazil, Thailand and Ukraine, where animal welfare, environmental and labour standards are lower. The cost of EU animal welfare rules for broiler chicken is estimated to account for 6.1% of the total production costs.[6]

[5] Number based on data regarding consumption of poultry meat in the EU – 28 provided by the OECD (in tons) and the number of tons imported in the EU – 28 by the European Commission (Eurostat).

[6] Peter L. M. van Horne, *Competitiveness of the EU poultry Meat Sector*, Base Year 2017, 7, International Comparison of Production Costs, Wageningen Economic Research, December 2018, available at: http://library.wur.nl/WebQuery/wurpubs/514230

2.2 ... AND INCREASING CONSUMER INFORMATION ON THE EU MARKET

Yet animal welfare is not a defining criteria in a level playing field; feed and labour costs are more determinant of production costs. The way to level the playing field for EU producers does not lie in reducing the animal welfare regulatory burden, as producers in the EU would not be in a position to compete with foreign goods even if exempted from current farm animal welfare standards. Instead, high animal welfare standards provide added value to animal products made in the EU, and largely benefit EU producers on the domestic and foreign markets, provided their goods are easily identifiable for consumers and institutional buyers. Method-of-production labelling would facilitate this by distinguishing between imported and locally produced goods, as well as bolstering the need for more robust farm animal welfare legislation in the EU by demonstrating consumer preferences for more sustainable and local products.

Method-of-production labelling would improve consumer knowledge. A recent EU-wide survey showed consumers are willing to pay a small premium for higher welfare farm animal goods.[7] The survey further demonstrated that such a premium tends to increase for labelled products.[8] Beyond consumers' willingness to pay, improved information leads to consumers who are better equipped to engage in a fundamental societal debate about all aspects of sustainability, including animal welfare.

[7] Clark et al, *Citizens, consumers and farm animal welfare: A meta-analysis of willingness-to-pay studies*, 112, 119 and 125, 2017, 68 Food Policy.

[8] Ipsos MORI, London Economics and AEA for the European Commission, *Research on EU product label options*, 2012, ENER/C3/2010-414, 91.

3 WHAT COULD THE CHARACTERISTICS OF THE LABEL BE?

The method-of-production label could draw inspiration from existing labelling systems (see box) which have been deemed acceptable by EU members and have not been challenged by WTO's members. This label would be universal, mandatory, public (enacted in law), and would include both positive and negative framing.

- First, a **universal** label that applies to all products, including imports, would be more effective than a selectively applied label, by precluding unlabelled products unfairly commanding a market share.
- Second, **mandatory** rather than voluntary labelling schemes tend to have a wider impact on reducing unsustainable practices due to enhanced market capture.[9] Mandatory labelling is also more likely to lead to harmonization of labels on the marketplace, which reduces confusion among consumers.
- Finally, **negatively framed** labels are regarded as more effective at influencing consumer behaviour.[10] An example of the information provided by the label on imported broiler chicken meat would thus be: 'intensive indoor – not EC compliant.' Information should stay minimal to avoid confusion.

[9] Commission, Feasibility study – Note that this study is critical of mandatory approaches. An argument in favour of mandatory approaches is included in the Farm Animal Welfare Council's report on welfare labelling (available at https://bit.ly/2kOPKzg), and in Farm Sanctuary, *The Truth Behind the Labels: Farm Animal Welfare Standards and Labelling Practices: A Farm Sanctuary Report* (April 2009), available at: https://bit.ly/2krqZJ0

[10] Grethe, *High animal welfare standards in the EU and international trade – How to prevent potential "low animal welfare havens?"*, 315, 324, 2007, 32 Food Policy.

EXISTING SCHEMES

The EU already has two method-of-production labelling schemes in place for eggs and fish products. Neither have been challenged at the WTO, so their compliance with the rules cannot be assessed with certainty.

Under the egg labelling scheme (2008), all imports of shell eggs must be labelled according to their method of production. This requirement excludes "class B" eggs (business-to-business egg products). The rules require country of origin labelling on imported eggs and further imposes a 'non-EC standards' mark for imports where there is "no sufficient guarantee as to the equivalence of rules". Following the introduction of this scheme, the overall number of egg-laying hens kept in alternative, non-cage systems steadily increased in the EU.[11] This is indicative of the positive impact of higher level of transparency in the sector.

EU rules also require labelling on all fish products (2013) marketed in the EU that indicates the method of production, catch area, and fishing gear used, among other factors.[12] [13] Information regarding the impact of this labelling scheme on consumer behaviour is not available.[14] However, a Eurobarometer study on fishery and aquaculture products provides some insight, with 73% of consumers saying they consider it important for a label to state whether a fish was farmed or caught wild.[15]

The EU also has various labelling schemes in place, notably on the Country of Origin of meat products, as well as for organic products and GMOs.

[11] European Parliament, *The Poultry and Egg Sectors: Evaluation of the Current Market Situation and Future Prospects*, p. 24, 2010, available at: https://bit.ly/2mx06Et. Since the 2008 EU Regulation on the mandatory labelling of methods of production of shell eggs, the portion of laying hens kept in alternative systems (non-caged) keeps increasing (source: Eurogroup for Animals, Optimising Laying Hen Welfare in Cage-Free Systems, p. 38, 2018, available at: https://bit.ly/2Qux4Dp).

[12] Regulation 1379/2013 of 11 December 2013, OJ L 354/1, Art 35(1).

[13] *Ibid.* Also see European Commission, *A pocket guide to the EU's new fish and aquaculture consumer labels*, 2014, available at https://bit.ly/2CXmtGJ (last visited 14 October 2018).

[14] Commission, *Feasibility Report on options for an EU ecolabel scheme for fishery and aquaculture products: Final Report*, 2016, available at https://bit.ly/2mwoypm (last visited 14 October 2018), 27.

[15] European Commission, *Special Eurobarometer 450: EU consumer habits regarding fishery and aquaculture products*, 6-7, 2017, available at https://bit.ly/2kviDQD (last visited 14 October 2018).

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4 WOULD SUCH A LABEL BE WTO COMPLIANT?

4.1 RELEVANT WTO AGREEMENTS

If a method-of-production labelling measure were to be challenged by other WTO members, it would likely be tested by the WTO Dispute Settlement Body (DSB) under the Technical Barriers to Trade (TBT) Agreement. This paper excludes the agreement on Sanitary and Phytosanitary measures (SPS agreement) from the scope of its analysis, as the method-of-production label discussed here would not have an underlying SPS purpose.[16] The General Agreement on Tariffs and Trade (GATT), however, could also apply to such a label and, in the absence of a mutual exclusivity rule between the TBT Agreement and the GATT, both may apply concurrently.[17] Following the rules stated in Annex 1A of the WTO Agreement,[18] the more specific regime must apply first, and the label would thus be tested under the TBT Agreement.[19] Given the similarity of the analyses under the TBT Agreement and the GATT, an analysis of the compliance of the hypothetical method-of-production label under TBT standards should be central to determining its legality in international trade law.

4.2 DOES THE LABEL FALL UNDER THE TBT AGREEMENT?

The label would pass the three tests established by the WTO Appellate Body in the *EC-Asbestos* case and would thus be considered a technical regulation.

1. the label lays down product characteristics;
2. compliance would be mandatory;
3. the label applies to an identifiable group of products.

[16] Bronckers and Soopramanian, *The impact of WTO law on EU food regulation*, EFFL, 6, 2008, 369, and Blattner, *Protecting Animals Within and Across Borders, extraterritorial Jurisdiction and the Challenges of Globalization*, 140, 2019, Oxford University Press.

[17] Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 862, 2013.

[18] This rule provides that, in a situation of conflict between the GATT and another covered agreement, the latter will prevail. Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) LT/UR/A/2 http://docsonline.wto.org (WTO Agreement), Annex 1A General Interpretative Note.

[19] WTO, European Communities – Measures Affecting Asbestos and Products Containing Asbestos – Report of the Panel, 18 September 2000, WT/DS135/R (EC – Asbestos), para 8.16

The only characteristic that could be questioned is whether a non-product-related process or production method (NPR-PPM) – in other words, a method of production that does not impact the final aspect of the product – can be described as a product characteristic. For instance, animal welfare is typically regarded as an NPR-PPM, as the final meat, fish, egg, or dairy product does not inform the consumer about the types of farming practices to which the animals were subjected. Under the TBT agreement the definition of a technical regulation is unclear, but the DSB appears to have settled upon a consistent approach to consider NPR-PPM-based labelling as a technical regulation, and therefore covered under the TBT agreement (for instance *EC-Asbestos*;[20] *US – Tuna II*;[21] *EC-Seal Products*).[22] WTO members have not challenged such a position.

4.3 TESTS UNDER THE TBT AGREEMENT

The TBT Agreement contains a number of substantive obligations which the label must meet to comply with WTO rules.

Article 2.1: Non-discrimination

This article mandates WTO members to offer the same treatment to like products of domestic and foreign origin, as well as between products of different foreign origin. The DSB conducts three tests to assess the compliance of a measure with Article 2.1 of the TBT Agreement. The first test requires that the measure must be a technical regulation (see above).

The second test looks into the similarity of two products ('likeness test'). The WTO Appellate Body has stated that the test for likeness in the TBT Agreement is a "determination about the nature and extent of a competitive relationship between and among the products at issue".[23] In *US – Tuna II*, the DSB set out four criteria to determine the likeness of products:[24]

1. the products must have the same physical properties;
2. the products must have the same end uses;
3. the difference between the two products must not affect consumer preferences; and
4. the products must be listed in the same international tariff classification.[25]

In the case of a method-of-production label, the indication of the method of production (e.g.: 'intensive indoor' versus 'extensive outdoor') could challenge the likeness of labelled products by affecting consumer preferences. However, all three other criteria would remain identical.

Could a product be considered unlike another simply based on method of production? In very early cases (*US – Tuna I* and *II*), the DSB interpreted that distinguishing a product based on the process was incompatible with the GATT.'[26] However, members never formally approved this report, and the question remained unaddressed by subsequent DSB panels. The absence of exceptions in the TBT agreement would tend to favour a more modern understanding of likeness to ensure a balance between WTO members' right to regulate and international rules. Another argument in favour of considering processes or production methods when testing likeness would be that they are included in the definition of a technical regulation in the TBT agreement. It would thus seem logical that substantive obligations within the TBT agreement are applicable to them.[27]

Method of production could also indirectly be taken into account via consumer preferences. In 2011, the Appellate Body ruled in the *Philippines-Spirits* case that consumer preferences are more about "consumers' tastes and habits than [...] physical characteristics" of a given product.[28]

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20 Appellate Body Report, EC Asbestos, para 67.

21 WTO, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs – Report of the Panel*, 15 March 2005, WT/DS174/R (EC – Geographical Indications), para 7.451; and *United States – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Report of the Panel*, 15 September 2011, WT/DS381/R (*US – Tuna II*), para 7.66 and 7.78.

22 WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body*, 22 May 2014, AB-2014-1 – AB-2014-2 (*EC – Seal Products*), para 5.14.

23 WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes – Report of the Appellate Body*, 4 April 2012, Ab-2012-1 (*US – Clove Cigarettes*), para 120.

24 Panel Report, *US – Tuna II* (Mexico), para 7.235. The test developed in *US – Tuna II* is based on a previous DSB ruling in Report of the Working Party on Border Tax Adjustments (1970) GATT BISD 18S/97 (Border Tax Adjustments), para 18.

25 *Ibid.*

26 C.R. Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals*, 22, 2011.

27 *Ibid*, 392.

28 WTO, *Philippines – Taxes on Distilled Spirits – Report of the Appellate Body*, 21 December 2011, WT/DS/396/AB/R, para 132. Note, this ruling is about likeness under GATT Art III.2.

Recent cases, such as further rulings in *US – Tuna II*, have shown that challenging countries such as Mexico themselves considered that the tuna they produced could not compete with 'Dolphin-safe' labelled tuna, recognizing consumer preferences based on production method. The panel in *US – Tuna II* deemed both tuna "like." However, at the request of the parties, the panel did not compare labelled with unlabelled tuna, but instead compared tuna products of different countries of origin.[29] The *US – Tuna II* ruling shows that, although it is a possibility, it is still unlikely for a member to raise consumer preferences as a justification for the use of a label to distinguish between animal-based products based on their method of production.

The third test requires that the measure does not afford 'less favourable treatment' to imported products compared to domestic or imported like products.[30] As the label would be origin-neutral, it would de jure respect this obligation to not discriminate among importers. However, a discrimination could be found "*de facto*" if an exporting country primarily uses a method of production banned under the label, if the product it exports is found to be "like" others, and if obtaining the label becomes an appealing commercial feature. For instance, in *US – Tuna II,* the DSB established a discrimination – or a distortion of the conditions of competition – as (1) the tuna exported by Mexican countries was deemed "like" the American tuna, (2) Mexican fishermen mostly used a fishing method that made it more difficult to obtain the 'Dolphin Safe' label and (3) the label mattered to US consumers. In the Appellate Body Report of this case, the DSB determined that detrimental impact on competitiveness did not "hinge upon whether imported products 'could' somehow obtain market access" but rather on "whether the contested measure modifies the conditions of competition to the detriment of imported products". In this case, the parties were in agreement that the labelling regime modified the conditions of competition.[31]

However, the DSB decided to add another test: if the discrimination stemmed exclusively from a "legitimate regulatory distinction",[32] the tested measure could be deemed compliant with Article 2.1.[33] There is, however, no set list of legitimate regulatory distinction. *US-Clove Cigarettes* and *US – Tuna II* indicate that such a measure should demonstrate "even-handedness in design, architecture, revealing structure, operation, and application in the light of the particular circumstances of the case."[34] For instance, arbitrary or unjustifiable discrimination or a disguised restriction on trade would prove uneven-handedness.[35] Other indicators have been used to test even-handedness: in *US – Tuna II*, the panels and the parties relied upon whether the measure was 'calibrated', meaning 'appropriately tailored to' or 'commensurate with' the objective and the different type of fishing. The *US-COOL* case features an example of a measure (recordkeeping requirements) that was not deemed grounded in a legitimate regulatory restriction, and was thus considered overburdening to the producers in light of the little amount of information provided to consumers.

Article 2.2: Legitimate regulatory purpose

The label must comply with article 2.2, which requires that measures must not create an unnecessary obstacle to trade or be more trade-restrictive than necessary to achieve a legitimate objective. The test under Article 2.2 first assesses whether the method-of-production label is restrictive of trade, and second, whether it pursues a legitimate objective. Finally, the test assesses whether the measure is proportionate to the objective pursued. A method-of-production label will likely restrict trade, but the extent to which it will calls for discussion.

In case of a WTO challenge, the panel will investigate the legitimate objective pursued by the measure, beyond the litigating parties' arguments. Several objectives could be

[29] Panel Report, *US – Tuna II* (Mexico), para 7.249.

[30] This test comes from GATT article III.4 but has been recognised as relevant for TBT art 2.2 by DSB

[31] WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 by Mexico, Recourse to Article 21.5 by USA*, 26 October 2017, WT/DS381/RW/USA, WT/DS381/RW/2 (Tuna II (Mexico) (Art 21.5 – USA, Mexico 2nd Recourse)), para 7.75.

[32] Appellate Body Report, *US – Clove Cigarettes*, paras 175.

[33] *Ibid.*, para 175.

[34] *Ibid.*

[35] WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* – Report of the Appellate Body, 16 May 2012, AB-2012-2 (*US – Tuna II*), para 213 citing TBT Agreement, preamble, recital 6. See also Panel Report, *US – Tuna II Mexico*) (*Art 21.5 – USA, Mexico Second Recourse*), para 7.82.

referred to, such as the protection of the protection of animal or plant life or health, and the protection of the environment, which are both included in the open list of legitimate objectives provided in Article 2.2 of the TBT Agreement. It would be possible to make a connection between intensive farming and animal health on the one hand and environmental damage on the other. As the DSB has recognised that legitimate objectives listed in other WTO-covered agreements can serve as further inspiration, the protection of public morals in relation to animal welfare could be added to the list of potential legitimate objectives behind method-of-production labelling. This objective was recognised by the DSB in *EC-Seals Products.*

However, it would be difficult to argue that any of these three objectives could be the central argument behind a method-of-production labelling measure, rather than just welcome side effects. While such a label would ideally result in a positive impact on the lives of animals, there are a number of intermediate goals towards which it would be more directly targeted, like increasing consumer information. This may in fact be regarded as a legitimate objective under Article 2.2 of the TBT agreement by arguing that it is a "precondition for the functioning of markets" and, thus, central to the objectives of the WTO.[36] The *US-COOL* case confirmed that the provision of information, in this case about the country of origin, was a legitimate objective related to the objective to prevent deceptive practices set out in Article 2.2 of the TBT Agreement and in Article XX(d) of the GATT.[37] The method-of-production label will thus have to be seen as contributing to the objective of better informing consumers.

The third and final test a measure must satisfy under Article 2.2 is the "necessity test" in relation to trade restrictiveness and not the measure *per se*.[38] In a test similar to the necessity test under Article XX of the GATT, the panel would assess factors including the contribution the measure makes to the designated objective, the trade-restrictiveness of the measure, and the nature of the risks at issue,[39] and would compare such factors with credible alternative measures.[40]

Article 2.4: Link to international standards

Article 2.4 requires the technical regulation to be based on relevant international standards. However, the TBT agreement does not define or list such standards, or any standardisation body. A panel would have to look into whether international standards exist, whether they are at the basis of the technical regulation and whether such standards are effective and appropriate means for the fulfilment of the legitimate objectives pursued.

Criteria applied by the DSB under Article 2.4 are so tightly defined that very few international standardisation initiatives are likely to meet them.[41] In the case of method of production of animal source food products, the only relevant international standards would be the OIE animal welfare standards,[42] the ISO 34700 on animal welfare management, and the Global Animal Partnership's add-on programme for animal welfare standardization and certification.[43] However, none of these standards are concerned with labelling.[44] In such a case, Article 2.9 of the TBT Agreement sets out certain notification requirements with which the hypothetical method-of-production label should comply.

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36 Conrad, *id.*, 398.

37 WTO, *United States – Certain Country of Origin Labelling (COOL) Requirements* – Reports of the Appellate Body, 29 June 2012, AB-2012-3 (US – COOL), 445.

38 Appellate Body Report, *US – Tuna II* (Mexico), para 319.

39 *Ibid*, para 322.

40 *Ibid*, para 322.

41 Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, European Journal of International Law, 56, 2016, 27:1.

42 World Organization for Animal Health, 'Terrestrial Animal Health Code' (25th edn, 2016), available at https://bit.ly/2mvy3Fh (last visited 14 October 2018),

43 For information, see https://bit.ly/2kYshvp (last visited 14 October 2018). For discussion, see: Ryland, *Animal Welfare Governance: GLOBAL G.A.P. and the Search for External Legitimacy* 30(3) Journal of Environmental Law (2018) 1.

44 WTO, European Communities – Trade Description of Sardines – Report of the Appellate Body, 26 September 2002, AB-2002-3 (EC – Sardines), para 275.

5 CONCLUSIONS

Method-of-production labelling is a key tool to increase consumer awareness and shift consumption and production towards more sustainable methods of animal agriculture practices. A mandatory, universal and public label with both positive and negative framing applied to animal source food products would offer the most potential to increase knowledge among consumers. Such a label is very likely to be found WTO compliant under the TBT agreement, which should encourage willing policy actors such as the EU to take the project to the next step.

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