Country of Origin Labelling on the Rise in EU Member States – An Analysis under EU law and the EU's International Trade Obligations

Ignacio CARREÑO, Tobias DOLLE and Yury ROVNOV*

Abstract

On 1 January 2017, France started a two-year trial of a mandatory country of origin labelling (hereinafter, COOL) scheme, which requires producers of milk, food containing milk products and food containing meat to provide information on the country of origin of the products. The scheme was introduced through Decree No 2016-1137 (i.e. Décret n° 2016-1137 du 19 août 2016 relatif à l'indication de l'origine du lait et du lait et des viandes utilisés en tant qu'ingrédient,[1] hereinafter, the Decree). Before the end of this trial period, France has promised to provide a report to the European Commission (hereinafter, Commission) that would allow it to review consumer patterns and the potential impact on the internal market. In view of the report, the Commission may consider implementing such a scheme in all EU Member States. This article also notes that other EU Member States are introducing their own COOL measures and concludes that, when COOL is being made mandatory, the EU's international trade obligations must be taken into account by the EU and its Member States.

I. Background

According to Article 2 of the Decree, the indication of the origin of beef, pork and meat of sheep, goats and poultry used as an ingredient must include, for each category of meat, the following information: (1) country of birth; (2) country of fattening; and (3) country of slaughter. When a category of meat comes from animals born, raised and slaughtered in the same country, the indication of origin may be given as "origin: (name of country)". Similarly, Article 3 of the Decree provides that the indication of the origin of milk or milk used as an ingredient in dairy products[2] must include the following information: (1) "country of collection: (name of country)"; and (2) "country of transformation: (name of country where it has been conditioned and transformed)". When milk or milk used as

* Ignacio Carreño is a Senior Associate, Tobias Dolle is an Associate and Yury Rovnov was, at the time of writing, a Junior Lawyer at *FratiniVergano – European Lawyers*, a law firm with offices in Brussels and Singapore that specialises in international trade and food law. An earlier version of this report appeared in Trade Perspectives©, Issue No. 1 of 14 January 2017, available at <http://www.fratinivergano.eu/en/trade-perspectives/>. The authors wish to thank Paolo R. Vergano for his valuable contributions to this article.

[1] JORF n°0194 du 21 août 2016, texte n° 18.

[2] Listed in Part II of the Annex to the Decree.

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an ingredient in dairy products has been collected and processed in the same country, the indication of origin may appear as "origin: (name of country)". Article 4 of the Decree provides for a number of facilitations depending on the origin. When the steps referred to in Articles 2 and 3 of the Decree are carried out in the territory of several EU Member States, the mention "EU" may be used, instead of the name of the country or countries to designate the location of the steps involved. In addition, when those steps are carried out in the territory of several countries located outside the EU, the words "Outside EU" may be used instead of the name of the country or countries to designate the location of the relevant steps. Finally, should the steps referred to in Articles 2 and 3 of the Decree be carried out in EU Member States and in countries located outside the EU, or if the origin is undetermined, the words "EU or outside EU" may be used.

According to Article 6 of the Decree, products lawfully produced or marketed in another EU Member State are not subject to the provisions of the Decree. The implementing decree of 28 September 2016[3] establishes the thresholds required for the application of the Decree at 50%, for milk used as an ingredient in a dairy product, and at 8%, for meat used as an ingredient in a processed product. Therefore, France's COOL scheme requires that, *inter alia*, ready meals with a meat content of more than 8% specify where livestock was born, reared and slaughtered.

There are already a number of food products that are subject to mandatory COOL in the EU, including fruits and vegetables,[4] beef,[5] fish,[6] olive oil[7] and honey.[8] Regarding meat, COOL was made mandatory for unprocessed fresh beef and beef products in the aftermath of the mad cow disease epidemic (i.e. Bovine spongiform encephalopathy, or BSE).[9] It is also required for pre-packed poultry meat imported from third countries.[10] In addition, the EU's Food Information Regulation No 1169/2011[11] (hereinafter, FIR) requires that unprocessed fresh, chilled or frozen meat of swine, poultry, sheep and goats be accompanied by COOL. Specific rules under this regulation are set out in European Commission Implementing Regulation No 1337/2013 of 13 December 2013.[12] Likewise, the FIR requires that COOL be mandatory in instances where a failure to

[3] Arrêté du 28 septembre 2016 fixant les seuils prévus par le décret n° 2016-1137 du 19 août 2016 relatif à l'indication de l'origine du lait et du lait et des viandes utilisés en tant qu'ingrédient, JORF n°0228 du 30 septembre 2016, texte n° 45.

[4] Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules of Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector, [2007] OJ L 350/1.

[5] Regulation (EC) No 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products, [2000] OJ L 204/1.

[6] Council Regulation (EC) No 104/2000 of 17 December 1999 on the common organisation of the markets in fishery and aquaculture products, [2000] OJ L 17/22.

[7] Commission Regulation (EC) No 1019/2002 of 13 June 2002 on marketing standards for olive oil, [2002] OJ L155/27.

[8] Council Directive 2001/110/EC of 20 December 2001 relating to honey, [2002] OJ L 10/47.

[9] Regulation (EC) No 1760/2000, supra note 5.

[10] Art. 5(4) of Commission Regulation (EC) No 543/2008 of 16 June 2008 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards the marketing standards for poultry meat, [2008] OJ L 157/46.

[11] Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, [2011] OJ L 304/18.

[12] [2013] OJ L 335/19. For the legislative history, see Ignacio Carreño, "New EU rules on the country of origin labelling for meat of swine, sheep, goats and poultry" (2014) 2 *EJRR* 2013.

provide such information could mislead consumers. The scope of mandatory COOL in the EU stands to be further expanded by specific provisions in the FIR that enable the Commission to table legislative proposals on mandatory COOL for, inter alia, milk, unprocessed foods and meat used as an ingredient in processed foods and thereby encompassing the scope of the French Decree.

After being notified by France of the draft Decree, on 12 April 2016, the Commission consulted the Standing Committee on Plants, Animals, Food and Feed (composed of representatives from the Commission and the EU Member States, hereinafter, SCPAFF) on the matter.[13] During the relevant meeting of the SCPAFF, a number of EU Member States raised concerns about the negative impact of the French measure on the access of non-French ingredient suppliers, particularly on small- and medium-sized enterprises, to food production and distribution in France. Other delegations did not oppose mandatory COOL as such, but expressed a preference for a harmonised approach at EU level, while a few delegations supported the French draft Decree. The Commission reminded the SCPAFF that the FIR allows EU Member States to adopt national measures on COOL on food under certain conditions. It also stated that "the topic was intensively debated at the co-decision stage and that the political and legal context has significantly evolved in recent years".

Other EU Member States are already moving to adopt similar COOL legislation. In the last few months, the SCPAFF has held exchanges of views on Italian, Lithuanian and Portuguese[14], and Greek[15] draft measures prescribing the indication of the country of origin of milk, dairy products and, in one case, rabbit meat. Italy's Decree of 9 December 2016 is already in force and will apply for a trial period until 31 March 2019.[16] In February 2017, the Spanish Ministry of Agriculture also announced a decree making the indication of the country of origin for milk and dairy products mandatory.[17]

II. Legal situation in the EU and perception of the French Decree

According to Article 39(2) of the FIR, EU Member States may introduce measures concerning COOL only where there is a proven link between certain qualities of the food and its origin or provenance. EU Member States must provide credible evidence to the Commission that the majority of consumers attach significant value to the provision of that information. Apart from the claimed wish of the consumer to know the origin or provenance of a product, there is often no established link between the respective EU

[13] Summary Report of the Standing Committee on Plants, Animals, Food and Feed held in Brussels on 12 April 2016, DG Sante document sante.ddg2.g.5(2016)2527400, <https://ec.europa.eu/food/sites/food/files/safety/docs/reg-com_gfl_20160412_sum.pdf> (accessed 28 March 2017).

[14] The Summary Report of the SCPAFF on 13–14 September 2016 addresses all three countries: <https://ec.europa.eu/food/sites/food/files/safety/docs/reg-com_gfl_20160913_sum.pdf> (accessed 28 March 2017).

[15] Summary Report of the SCPAFF on 10 October 2016, <https://ec.europa.eu/food/sites/food/files/reg-com_gfl_20161010_sum.pdf> (accessed 28 March 2017).

[16] Decreto 9 dicembre 2016 Indicazione dell'origine in etichetta della materia prima per il latte e i prodotti lattieri caseari, in attuazione del regolamento (UE) n. 1169/2011, relativo alla fornitura di informazioni sugli alimenti ai consumatori. (17A00291) (GU Serie Generale n.15 del 19-1-2017), <http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2017-01-19&atto.codiceRedazionale=17A00291&elenco30giorni=true> (accessed 28 March 2017).

[17] Vidal Maté, Agricultura obligará a poner el país de origen en los productos lácteos, 13 February 2017, <http://economia.elpais.com/economia/2017/02/12/actualidad/1486909504_261825.html> (accessed 28 March 2017).

Member State origin and a particular quality attribute. Such link must be established and corroborated by the respective EU Member State with respect to every single COOL scheme.

COOL measures in individual in EU Member States show a piecemeal approach within the EU's internal market. COOL appears to be a national priority in some EU Member States, possibly implying that what is produced in those EU Member States is of better quality and safer than products from abroad. It sometimes appears that such measures are proposed for rather simplistic and protectionist reasons. It is for these countries to recall that COOL was originally imposed for food safety and traceability reasons for beef in the aftermath of the BSE scandal. At that time, there was a food safety matter with, in particular, British beef. COOL helped all EU beef to regain consumer confidence. Milk, meat and meat products are all subject to the same harmonised EU hygiene and safety standards. For specific quality or regional products, inter alia, harmonised geographical indications requirements are in place at EU level or voluntary indications may be made.

On 11 February 2015, Members of the European Parliament had already adopted a resolution urging the Commission to put forward a legislative proposal incorporating mandatory COOL for meat used as an ingredient in processed foods.[18] The European Parliament's resolution followed a report that the Commission submitted to the European Parliament and the Council of the EU on 17 December 2013,[19] which elaborated on the consequences of making COOL compulsory for this sort of meat. The Commission's report concluded, in relevant part, that there was a need for EU institutions to further discuss the relevant issues and, on that basis, that the Commission would consider the appropriateness of tabling a legislative proposal. On 20 May 2015, the Commission adopted a report to the European Parliament and Council regarding the mandatory indication of the country of origin or place of provenance for milk, milk used as an ingredient in dairy products and types of meat other than beef, swine, sheep, goat and poultry meat[20] and regarding the mandatory indication of the country of origin or place of provenance for unprocessed foods, single ingredient products and ingredients that represent more than 50% of a food.[21]

European trade associations also appear to prefer a harmonised approach on COOL for milk and meat as an ingredient. The European Dairy Association (hereinafter, EDA) has expressed serious concerns to the Commission regarding the French initiative on mandatory origin labelling, which, in its view, reintroduces national barriers among EU Member States and hinders harmonised implementation of the FIR. The Commission informed the EDA that it had not raised any objection to the French measure and that the potential effects on the internal market, including its impact on imported foods from other EU Member States, would be evaluated in the context of the French authorities'

[18] European Parliament resolution of 11 February 2015 on country of origin labelling for meat in processed food (2014/2875(RSP)), P8_TA(2015)0034.

[19] Report of 17 December 2013 from the Commission to the European Parliament and Council regarding the mandatory indication of the country of origin or place of provenance for meat used as an ingredient, (COM(2013) 755 final), and the accompanying Commission Staff Working document of 17 December 2013 on origin labelling for meat used as an ingredient: consumers' attitudes, feasibility of possible scenarios and impacts (SWD(2013) 437 final).

[20] COM(2015) 205 final.

[21] COM(2015) 204 final.

report due in 2018. The EDA then turned to the EU Ombudsman, who launched an inquiry into the matter and found that the Commission's implicit approval of the French measure complied, from a procedural point of view, with the relevant legal requirements, in particular Article 45(3) of the FIR, since the Commission had consulted the SCPAFF on the Decree. Following that meeting, the Commission informed the complainant that it would not issue a negative opinion on the Decree. As regards the substance of the Commission's decision, the Ombudsman found in its Decision in case 1212/2016/PMC of 12 September 2016[22] that, at this stage, the EDA had not demonstrated mal-administration on the part of the Commission. The Ombudsman reassured the EDA that, should it raise such concerns with the Commission, and should it consider the Commission's response to be inadequate, it could complain to the Ombudsman again.

The European Meat and Livestock Trading Union (UECBV) reportedly argues that France's two-year COOL scheme trial could contribute to a "*fragmentation of the single market*".[23] FoodDrinkEurope (FDE), representing the European food and drink industry, has reportedly challenged France's COOL scheme for meat in ready meals and milk in prepared foodstuffs, claiming that it would lead to higher packaging and production costs, entail enforcement costs, and increase the administrative burden on businesses. FDE is reportedly arguing that the measure is aimed at encouraging local sourcing without regard to the detrimental impact that it may have on established supply chains, which transcend national, and sometimes even European, borders.[24] It is not clear whether Article 6 of the Decree, which states that products lawfully produced or marketed in another EU Member State are not subject to the provisions of the Decree, may accommodate these concerns. For example, a French producer using German meat as an ingredient must indicate so, while Germany-based producers, which are active on the French market, even if they use, inter alia, French meat, would be exempted from the additional COOL.

So far, the Commission does not appear to be inclined to introduce harmonised legislation for mandatory COOL for milk and meat used as an ingredient, and appears to prefer voluntary COOL. Another matter is that the Decree will inevitably lead to labels similar to the notorious COOL "blend of EU and non-EU honeys" on honey. It is possible that manufacturers in France will have to use similar wordings for their meat and milk ingredients. Current voluntary labels for ready meals of a French retailer in Belgium provide for alternatives and state, inter alia, "produced in Belgium with poultry of Belgium, Germany or the Netherlands, rice of Pakistan and spices of Thailand". Such labels listing "alternatives" could guarantee a certain degree of "sourcing and supply-chain flexibility" for producers without misinforming consumers.

Finally, the idea to "experiment" with national legislation for a period of about two years has been criticised, notably by the European Association of Dairy Trade (hereinafter, Eucolait). Such legislation has huge consequences for a significant number

[22] Decision in case 1212/2016/PMC concerning the European Commission's implicit positive decision regarding the French draft decree on mandatory origin labelling for milk and meat, <http://www.ombudsman.europa.eu/cases/decision.faces/en/71083/html.bookmark> (accessed 28 March 2017).

[23] Oscar Rousseau, "Pressure mounts on French country-of-origin scheme" 6 January 2017, <http://www.globalmeatnews.com/Industry-Markets/Criticism-mounts-for-France-s-COOL-scheme> (accessed 28 March 2017).

[24] Ibid.

of operators who will have to adjust their product flows and/or change their product labels. In a normal scenario, the impact of such measures is seriously analysed beforehand, not on a "trial and error" basis after being adopted. Eucolait particularly notes that an assessment in a little over two years' time concluding that the prices of products did in fact increase and that the desired effect of increasing consumption was not achieved will do little to satisfy operators and consumers who are already bearing the additional cost.[25]

The introduction of COOL requirements has consistently proved to be a controversial matter and the FIR's negotiating history shows a stark disparity of opinion at the very heart of EU institutions, EU Member States and relevant stakeholders.

III. The EU's international trade obligations

In developing mandatory origin labelling schemes, the EU's international trade obligations have to be taken into account. This applies to both the EU as a whole and its individual Member States, which are represented in the WTO by the Commission. In this respect, a number of lessons can be learnt from the US experience on mandatory COOL for certain agricultural commodities, which gave rise in 2008 to a landmark WTO dispute between the US and Canada.[26]

The Panel and Appellate Body reports in *US – COOL*[27] may leave one wondering whether a WTO-compliant origin labelling scheme can be devised at all.[28] In any case, the task does not appear straightforward. The Appellate Body did not deem persuasive Canada's arguments that providing consumers with information on origin is, per se, not a legitimate objective under the Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement).[29] However, the nature of COOL, which, by definition, draws a distinction between goods based on origin, is such that a finding of de facto less favourable treatment of imports under Article 2.1 of the TBT Agreement appears difficult to avoid.

The US COOL regulations required retailers to provide consumers with information on the origin of the covered agricultural commodities. In the case of beef and pork, origin

[25] The European Association of Dairy Trade (Eucolait), Letter of 29 June 2016 to the Commission in relation to the Italian draft decree on the mandatory indication of origin of milk and milk used as an ingredient, <http://www.eucolait.eu/userfiles/files/Position%20papers/2016_06_29%20%20Eucolait%20letter%20to%20Commissioner%20Andriukaitis%20-%20Italian%20draft%20decree%20on%20mandatory%20origin%20labelling%20for%20dairy.pdf> (accessed 28 March 2017).

[26] *United States – Certain Country of Origin Labelling (COOL) Requirements*, Request for consultations by Canada, WTO Doc., WT/DS384/1, G/L/874, G/TBT/D/33, G/SPS/GEN/890, G/RO/D/6, 4 December 2008.

[27] Dispute concerning the original measure: *United States – Certain Country of Origin Labelling (COOL) Requirements*, Report of the Panel, WTO Doc., WT/DS384/R, WT/DS386/R, 18 November 2011; *United States – Certain Country of Origin Labelling (COOL) Requirements*, Report of the Appellate Body, WTO Doc., WT/DS384/AB/R, WT/DS386/AB/R, 29 June 2012. Dispute concerning the US' compliance, through amendments introduced into the original measure, with recommendations made in the original dispute: *United States – Certain Country of Origin Labelling (COOL) Requirements (Recourse to Article 21.5 of the DSU by Canada and Mexico)*, Report of the Panel, WTO Doc., WT/DS384/RW, WT/DS386/RW, 20 October 2014; *United States – Certain Country of Origin Labelling (COOL) Requirements (Recourse to Article 21.5 of the DSU by Canada and Mexico)*, Report of the Appellate Body, WTO Doc., WT/DS384/AB/RW, WT/DS386/AB/RW, 18 May 2015.

[28] Petros C Mavroidis and Kamal Saggi, "What is not so cool about US–COOL Regulations? A critical analysis of the Appellate Body's ruling on US – COOL" (2014) 13(2) *World Trade Review* 317.

[29] *US – COOL*, Report of the Appellate Body, supra note 27, para 453.

was defined as the countries where the respective livestock was born, raised and slaughtered.[30] Retailers could obtain the necessary information only if it was recorded at every stage of the production process and transmitted further along the production chain.[31] The Panel found, and the Appellate Body confirmed, that, in order to ensure accuracy of this information and minimise the likelihood of error, meat processors inevitably had to segregate meat according to its origin.[32] The more origins are involved, the more burdensome is segregation and, therefore, the higher are the costs to comply with the COOL regulations.[33] Conversely, COOL compliance costs are minimised if a processor works with livestock or meat of only one origin.[34] The Panel and the Appellate Body considered that the US COOL measure, therefore, created an incentive for upstream producers to minimise their COOL compliance costs by giving up on imports and processing only meat from livestock born, raised and slaughtered in the US. The incentive was all the more pronounced because imports accounted for only a small part of the total volume of beef and pork consumption in the US.[35] The Panel further found that the general conclusion was supported by additional evidence. In particular, because of the COOL requirements: (1) fewer processing plants accepted imported livestock; (2) those plants that did accept imported livestock processed it on certain days of the week and certain times of the day only, which created logistical problems and additional costs for suppliers; and (3) the contracts of imported livestock suppliers with meat processors were amended to allow for unilateral termination by processors.[36] The US measure thus adversely affected the ability of imported livestock to compete with domestic livestock.[37]

The French Decree defines origin of meat in the same manner as the US regulations did – as the countries where respective animals are born, raised and slaughtered.[38] Unlike the US measure, it applies to meat used as an ingredient in foodstuffs rather than to unprocessed meat, as the latter is already mostly covered by the EU's mandatory labelling.[39] This does not affect the applicability of the analysis of the Panels and the Appellate Body in the *US – COOL* case.[40] In the food production chain, segregation will

[30] *US – COOL*, Report of the Appellate Body, supra note 27, para 3.

[31] *US – COOL*, Report of the Panel, supra note 27, para 7.317; *US – COOL*, Report of the Appellate Body, supra note 27, para 249.

[32] *US – COOL*, Report of the Panel, supra note 27, para 7.327; *US – COOL*, Report of the Appellate Body, supra note 2, para 310. The Appellate Body clarified: "We […] understand the Panel to have used the term 'segregation' to encompass a broad range of activities, including physically segregating animals into different pens or fields or identifying each animal through the use of ear tags or other physical markings [footnote omitted], temporally segregating animals by processing livestock of different origins on different days or at different times [footnote omitted], and segregating animals completely in the sense of choosing to process only livestock of a single origin [footnote omitted]" (*US – COOL*, Report of the Appellate Body, supra note 2, para 302).

[33] *US – COOL*, Report of the Panel, supra note 27, paras 7.331, 7.346.

[34] *US – COOL*, Report of the Panel, supra note 27, para 7.347.

[35] *US – COOL*, Report of the Panel, supra note 27, paras 7.349, 7.372; *US – COOL*, Report of the Appellate Body, supra note 27, paras 289–292.

[36] *US – COOL*, Report of the Panel, supra note 27, paras 7.377–7.378.

[37] *US – COOL*, Report of the Panel, supra note 27, paras 7.381, 7.403–7.404. *US – COOL*, Report of the Appellate Body, supra note 27, paras 291–92. For a critique of the Panel's attribution of these effects to the COOL measure, and of the Appellate Body's acceptance of the Panel's analysis, see Mavroidis and Saggi, supra note 28, at 309–14.

[38] Art. 2(I) of Décret n° 2016-1137, supra note 1.

[39] *Cf* the remarks in section I.

[40] As mentioned above (see section I.), there is harmonised EU law in place on COOL for unprocessed fresh beef and beef products, pre-packaged poultry, and unprocessed fresh, chilled or frozen meat of swine, poultry, sheep and goats.

arguably remain "a practical way"[41] to ensure compliance, while minimising the variety of origins appears a natural method to keep compliance costs down. The 2013 Commission report regarding the mandatory indication of origin for meat used as an ingredient supports this conclusion. It states, in particular, that a mandatory COOL measure "would pose operational challenges and require radical adaptations [by food business operators,] especially with respect to meat ingredients of mixed origin […]".[42] It further clarifies that "[t]he most impacted cost items are likely to be: the adaptation of sourcing practices, possible changes in the mix of suppliers, switching to smaller production batches, the adaptation of production process to achieve segregation by origin within the premises […]".[43] As laid out above, EU regulations already require collecting certain origin information on meat, but, firstly, the requirements of the French Decree for some meat products are stricter than those imposed by the EU regulations[44] and thus increase the burden on producers and, secondly, whether the EU-wide COOL requirements are themselves WTO-consistent is a separate issue. It is, therefore, not unlikely that the French measure may adversely affect the supplies from some sources.

The detrimental impact of a COOL measure could be avoided if food producers were able to simply pass all the additional costs on to the consumer. However, the Panel in the *US – COOL* case found that US consumers were not willing to bear the totality of the extra costs.[45] The attitude of European consumers appears to be no different: the Commission report reveals that, while generally claiming to be interested in receiving detailed information on origin of meat products, consumers in Europe are not ready to pay for it.[46] This means that producers of meat-containing products will have to either absorb the extra labelling costs or pass them on to upstream meat producers. Like in the US COOL case, discriminating against imported meat may prove "a practical way" for producers to minimise these extra costs.

A measure with detrimental impact on imports still does not violate the non-discrimination obligation in Article 2.1 of the TBT Agreement if such impact is justified as "stemming exclusively from a legitimate regulatory distinction". The Appellate Body ruled that the detrimental impact of the original US COOL regulation was not justified because the labels communicated to the consumer only a small part of the information collected and transmitted along the production chain and the burden imposed on the producers was thus disproportionate vis-à-vis the benefit for the consumer.[47] In particular, where all the three steps (i.e., the birth, raising and slaughtering) did not take place in the US, the consumer could not understand from the information provided on the

[41] *US – COOL*, Report of the Panel, supra note 27, para 7.320.

[42] European Commission Report on COOL for meat, supra note 19, 10.

[43] Ibid.

[44] For example, in the case of pork, the current EU rules do not require the indication of the place of birth of the animal. See Recital 2 and Art. 5 of European Commission Implementing Regulation No 1337/2013 of 13 December 2013.

[45] Two considerations brought the Panel to this conclusion. First, the text of the regulation itself acknowledged that consumers showed no interest in a *voluntary* COOL regime and were not prepared to pay "sufficiently higher prices" for meat labelled as originating from the US. Second, slaughterhouses bought imported livestock with a significant discount to compensate for the extra COOL costs related to imported livestock. See *US – COOL*, Report of the Panel, supra note 27, paras 7.353–7.355. For a critique of the Panel's attribution of this discount to the US COOL measure, see Mavroidis and Saggi, supra note 28, 309.

[46] European Commission Report on COOL for meat, supra note 19, 8.

[47] *US – COOL*, Report of the Appellate Body, supra note 27, para 347.

labels where each of the steps actually occurred,[48] even though upstream producers had to keep records with information on each of those steps. The later amended US COOL measure, while an improvement vis-à-vis the original one in terms of accuracy of information appearing on the labels, still failed to fully remedy the imbalance.[49]

The French Decree may present similar vulnerabilities. While requiring, generally, that information on origin include the *country* of birth, raising and slaughtering, the Decree allows that "EU", "Non-EU" or even "EU or non-EU" designations be used instead.[50] As upstream producers may not know the level of detail with which the origin of a specific lot of meat will be communicated to the consumer, they may have to keep the most detailed records provided for by the law. This may create the type of disparity between the ends and means condemned by the Appellate Body in *US – COOL*. The Commission estimated that a COOL measure of this kind may result in producers' operating costs going up by as much as 50%.[51] Information communicated through the label to the consumer must be detailed enough to justify this extra burden. The "Non-EU" and "EU or non-EU" labels do not appear to meet this standard. Bulking all non-EU countries together under the "Non-EU" designation strongly suggests a protectionist nature of the measure, as it creates an EU versus non-EU opposition, rather than communicating meaningful information on origin. The "EU or non-EU" label, on the other hand, hardly provides any useful information at all.

Finally, the Panel and the Appellate Body found that the disproportionality of the US' original and amended COOL measure was exacerbated by broad exemptions from the labelling requirements.[52] In particular, origin did not have to be indicated for meat: (1) sold by smaller retailers; (2) used as an ingredient in a processed food item; or (3) prepared or served in a food service establishment.[53] Because of these exemptions, "between 57.7% and 66.7% of beef consumed in the United States, and between 83.5% and 84.1% of pork muscle cuts, [conveyed] no consumer information on origin despite imposing recordkeeping burdens upstream",[54] which meant that the producers' COOL costs were incurred in vain. The French Decree exempts from its scope food products whose milk or meat content is below a certain threshold,[55] which is currently set at 8% for meat and 50% for milk.[56] As the *US – COOL* reports suggest, these exemptions may

[48] *US – COOL*, Report of the Appellate Body, supra note 27, para 343. See also ibid, para 338, referring to *US – COOL*, Report of the Panel, supra note 27, para 7.718.

[49] The compliance Panel found that the amended measure had actually *increased* the record-keeping burden on upstream producers, while allowing, in certain cases, not to indicate on the label all countries where the animals were raised. See *US – COOL (Article 21.5)*, Report of the Panel, supra note 27, paras 7.266, 7.269; *US – COOL (Article 21.5)*, Report of the Appellate Body, supra note 27, para 5.46.

[50] Arts. 2(III, VI), 4 of Décret n° 2016-1137, supra note 1. Similar designations are allowed under the existing EU law. See, for instance, Art. 5 of European Commission Implementing Regulation No 1337/2013 of 13 December 2013.

[51] European Commission Report on COOL for meat, supra note 19, p. 10. This estimate was made before the enactment of European Commission Implementing Regulation No 1337/2013 of 13 December 2013 and thus apparently uses as the benchmark the situation that existed before its entry into force.

[52] *US – COOL (Article 21.5)*, Report of the Appellate Body, supra note 27, paras 5.99–5.108.

[53] *US – COOL*, Report of the Panel, supra note 27, paras 7.101, 7.104, 7.106.

[54] *US – COOL (Article 21.5)*, Report of the Appellate Body, supra note 27, para 5.106, referring to *US – COOL (Article 21.5)*, Report of the Panel, supra note 27, para 7.273.

[55] Art. 1(I)(3) of Décret n° 2016-1137, supra note 1.

[56] Supra note 3.

also affect the WTO-compatibility of the measure by expanding the gap between the record-keeping burden and the informational impact of the labels.

IV. Conclusion

The increased (regulatory) activity in EU Member States and in the EU on COOL (in particular the reports of France after its trial, but also of other EU Member States and the possible legislative proposals put forward by the Commission) indicate that these developments are gaining momentum again. Considering the implications laid out above, they should be monitored and stakeholders should be prepared to participate in shaping potentially harmonised EU legislation by interacting with relevant EU institutions, trade associations and affected stakeholders.

In any case, these schemes would have to be consistent with EU law and WTO obligations, so as to avoid potentially costly and destabilising litigation, as well as commercial and legal uncertainty for economic operators.