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SOME LEGAL ASPECTS OF POLISH-UKRAINIAN AGRICULTURAL TRADE CONFRONTATION

ABSTRACT Due to a key role of Ukrainian cereals and oilseeds in the global food security, any disruptions to export flows from Ukraine may be of great importance. Following Russia's full-scale invasion in February 2022 and the blockade of Ukrainian ports, the EU provided the so-called solidarity lane for exporting agricultural goods originating from Ukraine through the EU to the sea ports. EU border states to Ukraine, including Poland, Romania, Slovakia, Hungary, and Bulgaria have been complaining about market distortions due to a surge in agricultural exports from Ukraine. The most noticeable confrontation is observed between Poland and Ukraine, where Polish farmers occasionally block the border with Ukraine to stop imports from the neighbouring state.

This paper aims to provide a legal analysis of the ongoing trade tensions between Poland and Ukraine, focusing on the trade-related measures applied to Ukrainian grains imported to the EU and legal instruments to manage their negative consequences. Especially the regime of EU autonomous trade measures for agricultural imports from Ukraine will be studied, together with its modifications over the past two years. Additionally, some approaches to mitigate the negative impact of the import duties suspensions with Ukraine will be taken into consideration.

KEYWORDS: agricultural trade, EU-Ukraine Association Agreement, suspension of import duties, tariff rate quotas, cereals, oilseeds, export restraints, unilateral trade measures, autonomous trade measures

SŁOWA KLUCZOWE: handel produktami rolnymi, układ o stowarzyszeniu między UE a Ukrainą, zawieszenie należności celnych przywozowych, kontyngenty taryfowe, zboża, nasiona oleiste, ograniczenia wywozu, jednostronne środki handlowe, autonomiczne środki handlowe

1. INTRODUCTORY NOTES

Known as the “breadbasket of Europe” since the 19th century, Ukraine is a major exporter of grains and oilseeds worldwide. Given that a large portion of Ukrainian grain is normally shipped to North Africa and the Middle East, Ukrainian exports play a crucial role in the global food security.

After Russia initiated its full-scale invasion in February 2022 and Ukrainian ports were effectively blockaded, the country faced an acute challenge in exporting its agricultural production, as 90% of grain and oilseed exports had previously been transported via the Black Sea maritime route.¹ The obvious short-term solution was to reroute agricultural shipments through the territory of Ukraine's western EU neighbours, including Poland, Romania, Slovakia, and Hungary. Subsequently, these states, as well as Bulgaria, complained of market distortions due to a surge in agricultural exports from Ukraine. Besides the political discussions, Polish farmers occasionally block the border with Ukraine.

This paper is to provide a legal analysis of trade-related measures applied to Ukrainian grains imported to the EU and legal instruments to manage their negative consequences. First, a chronology of EU solidarity response to support Ukraine and its outcome for the cross-border trade in agricultural products will be presented. Second, the efforts for adjustment of the incumbent legal instruments will be taken into consideration. Third, possible legal or trade policy instruments to settle the issue will be analysed.

2. EU SOLIDARITY RESPONSE WITH UKRAINE

2.1. TRANSPORT LIBERALISATION

In May 2022, the EU issued the Solidarity Lanes Action Plan, which among other objectives aimed at establishing alternative logistics routes linking the EU to Ukraine until Ukraine's access to Black Sea routes is restored.² A key priority was the transfer of agricultural goods to European seaports, but the Plan also included short-term measures for the storage of agricultural goods exported from Ukraine within the EU territory, as Ukrainian storage capacities needed to be made available for the new harvest.³

To support the solidarity lanes, on 30 June 2022, the EU and Ukraine signed the Agreement on the carriage of freight by road, based on Article 136 of the EU-Ukraine Association Agreement (further EU-Ukraine AA) to temporarily facilitate

¹ USDA, FSA, Grain and Feed Quarterly, UP2024-0002, <https://fas.usda.gov/data/ukraine-grain-and-feed-quarterly-7> (access date: April 2024), p. 3; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "An action plan for EU-Ukraine Solidarity Lanes to facilitate Ukraine's agricultural export and bilateral trade with the EU", 12 May 2022, COM(2022) 217 final, p. 1.

² *Ibid*, p. 1.

³ *Ibid*, p. 7.

bilateral road freight transport.⁴ According to Article 4 of the Agreement, Ukrainian road haulage operators gained access to transport services within the EU. During the first year of operation under the Agreement, Ukrainian haulers increased their operations on the EU roads by around 40%.⁵

The Agreement was initially concluded for one year and was later extended until 30 June 2025 with certain amendments to improve implementation.⁶

2.2. AUTONOMOUS TRADE MEASURES (ATMS)

Trade in agricultural goods between the EU and Ukraine is covered by the EU-Ukraine AA, which entered into force on 1 September 2017.⁷ The trade chapter of the Agreement which establishes a Deep and Comprehensive Free Trade Area between the EU and Ukraine has been in force since 2014.⁸

Article 29(1) EU-Ukraine AA provides for elimination of customs duties in bilateral trade in accordance with the tariff schedules. However, most agricultural products originating from Ukraine are still the subject of import duties as of Annex I-A to EU-Ukraine AA. Certain agricultural goods, including cereals, sugar, poultry and eggs are granted duty-free access within the so-called tariff rate quotas (Appendix A to the Annex I-A EU-Ukraine AA). Herewith, the EU enabled Ukraine to import some volumes of its most competitive agricultural goods to the EU, but at the same time to protect EU producers from excessive imports. All in all, the EU market access for agricultural goods, even under a FTA is still very limited, thus, the common agricultural market is still isolated from international markets.

In light of the bilateral goal for the progressive establishment of a free trade area between the EU and Ukraine, as agreed upon in Article 25 EU-Ukraine AA, a possibility to accelerate and to broaden the scope of the progressive elimination of customs duties as outlined in Article 29 EU-Ukraine AA, the EU approved a set of ATMs for Ukrainian imports into the EU in June 2022.⁹

⁴ Art. 1, *OJ L* 179, 6 July 2022, pp. 4-10.

⁵ DG on Mobility and Transport, Commission tables extension to EU-Ukraine road transport agreement, available at: https://transport.ec.europa.eu/news-events/news/commission-tables-extension-eu-ukraine-road-transport-agreement-2023-02-02_en (access date: 20 February 2024).

⁶ https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1305 (access date: 10 August 2024), *OJ L*, 2024/1876, 2 July 2024, pp. 2-3

⁷ *OJ L* 193, 25 July 2017, p. 1-1.

⁸ *OJ L* 161, 29 May 2014, p. 3-2137; Council Decision 2014/668/EU of 23 June 2014 (*OJ L* 278, 20 September 2014, p. 1-3).

⁹ Regulation (EU) 2022/870 of the European Parliament and of the Council of 30 May 2022 on temporary trade-liberalisation measures supplementing trade concessions applicable to Ukrainian

These measures included the suspension of tariff rate quotas (TRQs) and the entry price system for agricultural goods originating from Ukraine; no custom duties were to be levied on these goods.¹⁰ Additionally, the application of the EU common rules on imports for Ukrainian goods was also suspended.¹¹ This suspension means that ordinary surveillance measures, safeguard mechanism for imports, and non-tariff safeguard measures are temporally not applicable to Ukrainian imports.¹²

The granting of the ATMs was conditional on compliance with the rules of origin, reciprocity, as well as respect for EU values and sustained efforts to fight corruption on Ukraine's side (Article 2 Regulation (EU) 2022/870). A temporary suspension of the ATMs, as per Article 3(1) Regulation (EU) 2022/870, was only possible in cases of non-compliance with the conditionality clause of Article 2.

Under these circumstances, the Commission recognised that a specific safeguard mechanism for quantitative restrictions was necessary.¹³ According to Article 4(1),(3),(8) Regulation (EU) 2022/870, where imports from Ukraine “cause, or threaten to cause, serious difficulties” to EU producers of like or directly competing products, the Commission upon request of a Member State, representatives of producers or on own initiative and after an assessment of the economic data, was entitled to reintroduce customs duties on imports of that product in accordance with the ordinary conditions under the EU-Ukraine AA “for as long as necessary” to respond to the issue.

Although the regulation did not define “serious difficulties”, introductory note 11 of the Regulation justified the Commission's action under Article 4 if the EU producers were “seriously affected by imports”. Furthermore, as the safeguard procedure under Article 4 Regulation (EU) 2022/870 was created by analogy with the common rules for imports (Article 5, 9 Regulation (EU) 2015/478), the definitions of the latter may be helpful for interpretation. Here, “serious injury” is defined as “a significant overall impairment in the position of Union producers” and a “threat of serious injury” as a “serious injury that is clearly imminent” (Article 4(2),(3) (a)(b) Regulation (EU) 2015/478). Therefore, the threshold for implementing an ATM safeguard clause must be lower because it does not require a significant injury

products under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (*OJ L 152, 3 June 2022, p. 103*), introductory note 4.

¹⁰ *Ibid*, introductory note 7, Art. 1(1)(a),(c).

¹¹ *Ibid*, Art. 1(3).

¹² Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports (*OJ L 83/16 27 March 2015*), Art. 4, 7(2), 15(1), 16.

¹³ Regulation (EU) 2022/870, introductory note 12, Art. 4.

or harm to trigger its activation; merely encountering difficulties is sufficient. Hence, the producers should be significantly negatively affected by Ukrainian imports.

In addition to the safeguard mechanism, Article 4(9) Regulation (EU) 2022/870 introduced an instrument of emergency measures (“any preventive measure which is necessary”), which may be taken by the Commission in exceptional circumstances requiring immediate action (apparently, by analogy with Article 7 Regulation (EU) 2015/478).

Thus, the implementing powers were granted exclusively to the Commission.¹⁴ Simultaneously, the Commission also had the obligation to pursue a regular monitoring of the impact of the TRQ suspensions and to publish information on imports of TRQ products (Article 4(2), 6 Regulation (EU) 2022/870).

3. TRADE IMPLICATIONS OF THE EU PREFERENTIAL MEASURES

Apparently, the infrastructure in the border EU Member States was insufficient to ensure the export of Ukrainian agricultural goods to European ports, which often resulted in goods being stuck at the borders of transit countries where they tended to be sold on domestic markets.¹⁵ Therefore, by the summer of 2022, a surge of agricultural products originating from Ukraine was registered in the EU Member States bordering Ukraine.

Prior to the war, Ukraine supplied almost half of the cereals (52% of the EU maize imports) and vegetable/rapeseed oils (23% and 72% of the EU total imports, respectively) and a quarter of the poultry meat imported to the EU.¹⁶ However, the overall imports of these products to the EU are rather limited due to high import duties and/or tariff rate quotas.

Thus, while monthly grain exports (mostly wheat, maize, barley) from Ukraine to the EU before 2022 amounted to 2.5-3.5 million tons, with possible seasonal

¹⁴ *Ibid*, introductory note 11, Art. 5.

¹⁵ R. Vos, J. Glauber, *Eastern European farmers protest gluts of Ukraine food exports: The struggle to keep solidarity lanes open*, IFPRI, at: <https://www.ifpri.org/blog/eastern-european-farmers-protest-gluts-ukraine-food-exports-struggle-keep-solidarity-lanes> (access date: 2 April 2024); E. Dodd, C. Welsch, *Fracturing Solidarity: The Grain Trade Dispute between Ukraine and the European Union*, CSIS, February 2024, at: <https://www.csis.org/analysis/fracturing-solidarity-grain-trade-dispute-between-ukraine-and-european-union> (access date: February 2024).

¹⁶ European Commission. *Following the expiry of the restrictive measures on Ukrainian exports of grain and other foodstuff to the EU, Ukraine agrees to introduce measures to avoid a renewed surge in EU imports*, press release, 15 September 2023, IP/23/4497, p. 1.

spikes up to 5-6 million tons, the exports through the solidarity lanes between March 2022 and June 2023 were approximately 1.5 to 2.5 million tons per month.¹⁷

Although the so-called Black Sea Grain Corridor within the Black Sea Grain Initiative (BSGI) operating between August 2022 and July 2023 allowed for the shipment of around 2-3 million tons of grain per month (predominantly maize and wheat), the exports into the EU through the solidarity lanes did not decrease¹⁸ (apparently, among other reasons, due to seasonal dynamics).

The grain and sunflower seed exports to the EU border states and Bulgaria increased dramatically in 2022 compared to 2021. It is notable that these countries did not import significant amounts of these products from Ukraine before 2022. Thus, Romania accounted for the steepest and most considerable increase in Ukrainian grain imports (5.5 million tons), followed by Poland (2.7 million tons), Hungary (1.6 million tons), and Slovakia (almost 0.5 million tons). For sunflower seeds, Bulgaria and Romania experienced the highest surge in imports from Ukraine.¹⁹

All in all, wheat exports from Ukraine to the EU increased in 2022/2023 compared to the previous marketing year by over 1600% and exceeded 7.7 million tons, while the exports to Africa and Southeast Asia fell dramatically.²⁰ The increase in corn exports was much more modest (around 27%), but at the same time, the corn exports from Ukraine to the Middle East halved.²¹

The surge of agricultural products on the EU market was also reflected in price dynamics: grain and oilseed prices were high from March to May 2022, they relaxed after the start of the solidarity lanes, and further decreased with the launch of the BSGI. In July 2023, they approximately reached the 2021 level and entered the low-price period.²²

4. THE CRISIS EVOLVES

Political discussions about the implications of the solidarity routes on agricultural producers in the EU Member States bordering Ukraine began in the summer of 2022. On 15 April 2023, Poland imposed a temporary ban on the importation and transit of a wide range of plant and animal products from Ukraine, although the

¹⁷ R. Vos, J. Glauber, comparable statistics in USDA, FSA, p. 3.

¹⁸ R. Vos, J. Glauber, comparable statistics in USDA, FSA, p. 3.

¹⁹ R. Vos, J. Glauber.

²⁰ USDA, FSA, p. 16.

²¹ *Ibid*, p. 13.

²² <https://www.consilium.europa.eu/en/infographics/ukrainian-grain-exports-explained> (access date: 10 August 2024).

transit ban was lifted several days later.²³ Similar measures of Slovakia, Hungary, and Bulgaria followed within a few days.

Given that the consultations within the EU did not succeed, the Commission “replaced” the unilateral measures of the beforementioned Members States on 2 May 2023 with a less intensive measure and imposed a *de facto* temporary import ban on four categories of cereals and oilseeds from Ukraine into Bulgaria, Hungary, Poland, Romania, and Slovakia. The exception was made solely for the execution of contracts that had been signed earlier. In fact, the Commission adopted an exceptional and temporary preventive measure under Article 4(9) Regulation 2022/870, acknowledging that due to the urgency of the situation, an investigation under the ordinary safeguard procedure was impossible.²⁴

Although the EU Commission recognised temporary distortions in the markets of the five transit states in the spring of 2023, it noted that the distortions had disappeared by 15 September 2023 and did not extend the import ban.²⁵ On the very day the EU ban expired, Poland, Hungary, and Slovakia imposed unilateral import restrictions through executive decisions.²⁶ A few days later, Bulgaria imposed a temporary import ban for sunflower seeds originating from Ukraine until November 2023. These restrictions are still in force, influenced by local political developments in Poland, Hungary, and Slovakia.

These three states also left a special coordination platform, which was set up in May 2023 to develop infrastructure, increase logistical capacity, and remove administrative barriers to the export of agricultural products from Ukraine. At the same time, Romania and Bulgaria seem to co-operate with Ukraine and are searching for step-by-step bilateral solutions.

²³ Regulation No. 717 of 15 April 2023 and Regulation No. 751 of 21 April 2023 of the Minister of Economic Development and Technology of the Republic of Poland at: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20230000717> (access date: 10 August 2024).

²⁴ Commission Implementing Regulation (EU) 2023/903 of 2 May 2023 introducing preventive measures concerning certain products originating from Ukraine (*OJ L 114 I/1*, 2 May 2023), introductory note 5; Commission Implementing Regulation (EU) 2023/1100 of 5 June 2023 introducing preventive measures concerning certain products originating from Ukraine, *OJ L 144/1*, 5 June 2023.

²⁵ European Commission, press release, 15 September 2023, IP/23/4497, p. 1, see also <https://agridata.ec.europa.eu/extensions/Ukraine/Ukraine.html>.

²⁶ Regulation No. 1898 of 15 September 2023 of the Minister of Economic Development and Technology of the Republic of Poland at URL: <https://dziennikustaw.gov.pl/D2023000189801.pdf> (access date: 10 August 2024); Government Decree of Hungary 430/2023 (IX. 15.) on the amendment of the Government Decree 130/2023 (IV. 18.); Resolution No. 466/2023 of the Government of the Slovak Republic.

In addition to the political tensions, there have been multiple cases of Polish farmers blocking trucks and trains carrying Ukrainian grain at the border. In mid-February 2024, the protests intensified after the EU agreed on a further suspension of import tariffs for Ukrainian agricultural goods. Although primarily motivated by their own financial constraints due to high production costs and low agricultural prices, the farmers also express concerns about the low quality of Ukrainian agricultural goods. Generally, farmer protests have been taking place throughout the EU in response to increased formalities and the high ecological and social standards in EU agriculture.

5. AMENDMENTS OF THE EU INSTRUMENTS TO RESPOND TO THE CHALLENGES

5.1. ADJUSTMENTS OF THE CAP SUPPORT

As of spring 2022, the EU faced high food inflation, particularly in grains and oilseeds, accompanied by low stocks, especially of sunflower oil and animal feed.²⁷ The short-term solution involved granting additional state aid to primary agricultural producers.²⁸ EU Member States were required to select specific sectors to support producers who were most affected by market disturbances.²⁹

Under this support scheme, Poland received almost 44 million EUR from the EU budget, which was distributed to more than 20 000 fruit, vegetables, and pork producers.³⁰ This amount was the highest among the new EU Member States. Most of the States also provided national top-up payments to agricultural producers, which were often even higher than the transfers from the EU budget. However,

²⁷ European Commission, press release, 15 September 2023, IP/23/4497, p. 1-2.

²⁸ Communication from the Commission “Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia” (2022/C 131 I/01) (*OJ C 131I 24 March 2022*, pp. 1-17). See also https://agriculture.ec.europa.eu/news/commission-presents-support-measure-worth-eu563-million-bulgarian-polish-and-romanian-farmers-2023-03-20_en (access date: 10 August 2024).

²⁹ Commission Delegated Regulation (EU) 2022/467 of 23 March 2022 providing for exceptional adjustment aid to producers in the agricultural sectors (*OJ L 96/4 24 March 2022*), preamble, number 7, Art. 2.

³⁰ Exceptional adjustment aid to producers in the agricultural sectors according to Commission Delegated Regulation (EU) 2022/467 (based on Member States’ notifications due by 15 May 2023) at: https://agriculture.ec.europa.eu/system/files/2023-07/ms-distribution-exceptional-package-500mil_en_0.pdf (access date: 10 August 2024).

Poland and Hungary were among the few EU Member States that did not provide additional national support for their agricultural producers.

On 20 March 2023, additional EU aid exclusively for Polish, Bulgarian, and Romanian farmers was agreed upon.³¹ A month later, on 3 May 2023, the EU announced support from the EU agricultural reserve for cereal and oilseed producers from five neighbouring states of Ukraine.³² In response, the Member States in focus committed to lifting their unilateral measures on Ukrainian imports. The recipient countries were eligible to complement these transfers with national funds up to 200%. Consequently, additional national top-up payments totalling 1 billion EUR for direct grants to primary producers in Poland were approved by the Commission in May 2023.³³

Apparently, an increase in direct domestic support may not be the best option to ease the situation, as it creates incentives for farmers to produce more. Consequently, increased imports from Ukraine, coinciding with increased domestic production, would further depress prices on agricultural goods, prompting EU agricultural producers to seek further financial support.

5.2. NEW ATM REGULATION AND ITS EFFECT ON TRADE

The ATMs for Ukraine were extended in spring 2023 for another year.³⁴ Due to the political issues mentioned above, the safeguard measures eligible under the ATM regulation were somewhat tightened.

First, to emphasize the potential for quick action, safeguard measures eligible under the new ATM regulation were named an expedited safeguard. According to Article 4(1) Regulation (EU) 2023/1077, the Commission gained the right to reintroduce customs duties otherwise applicable under the EU-Ukraine AA, where the

³¹ https://agriculture.ec.europa.eu/news/commission-presents-support-measure-worth-eu563-million-bulgarian-polish-and-romanian-farmers-2023-03-20_en, <https://www.consilium.europa.eu/en/meetings/agrifish/2023/03/20/>, https://agriculture.ec.europa.eu/news/eu100-million-support-farmers-bulgaria-hungary-poland-romania-and-slovakia-2023-05-03_en (access date: 10 August 2024).

³² https://agriculture.ec.europa.eu/news/eu100-million-support-farmers-bulgaria-hungary-poland-romania-and-slovakia-2023-05-03_en (access date: 10 August 2024).

³³ https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2871 (access date: 10 August 2024).

³⁴ Regulation (EU) 2023/1077 of the European Parliament and of the Council of 31 May 2023 on temporary trade-liberalisation measures supplementing trade concessions applicable to Ukrainian products under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (*OJ L 144*, 5 June 2023, p. 1).

imports from Ukraine “adversely affect” the EU market for like or directly competing products “for as long as necessary to counteract the adverse effects”. The previous regulation required “serious difficulties” on the EU side (see 2.2.). Regulation (EU) 2023/1077 did lower the threshold for safeguard measures as an adverse effect implies difficulties. Moreover, a mere threat of difficulties is no longer sufficient. Thus, the terminology of the safeguard was merely aligned with introductory note 11 of the Regulation (see 2.2), and the similarities with the common rules on imports were eliminated.

Before taking safeguard measures, the Commission is required to perform a market assessment under the request from a Member State or on its own initiative (Article 4(3) Regulation (EU) 2023/1077). Both require sufficient *prima facie* evidence of imports adversely affecting the market.

Second, the Commission is to pursue closer monitoring of the imports of goods subject to the TRQ suspension and their impact on EU producers (Article 4(2) and Article 6 Regulation (EU) 2023/1077).

Without any doubt, the import volumes of agricultural products under the ATM scheme in the calendar year 2023 were much higher than the TRQs authorized by the Appendix to Annex I-A EU-Ukraine AA (see Table 1). However, it does not necessarily imply that the EU producers in all relevant agricultural sectors were negatively affected. At the same time, some products subject to ATMs, like pork meat, were not imported from Ukraine into the EU at all.

TABLE 1. Imports of certain agricultural goods originating from Ukraine to the EU in 2023

Product	TRQ under the EU-Ukraine AA, t/year	Imports into the EU in 2023, tons
Poultry	TRQ 1 – 50 000; TRQ 2 – 20 000	TRQ 1 – 150 000; TRQ 2 – 13 000
Eggs	TRQ 1 – 3 000; TRQ 2 – 3 000	TRQ 1 – 37 000; TRQ 2 – 29 000
Sugar	20 700	400 000
Wheat and flour	1 000 000	6 000 000
Barley	350 000	780 000
Maize	650 000	13 000 000
Honey	6 000	46 000

Source: Approximate calculations based on DG TAXUD, Surveillance 3, extracted on 12 February 2024.

The import ban to the EU border states to Ukraine in the summer of 2023 and the substantial unilateral restrictions had visible negative implications primarily for

maize (which may be partially due to seasonal volatilities) and oilseed imports from Ukraine.³⁵ However, sunflower seeds and rapeseeds were never covered by a TRQ, and the import duties on these in the EU are set at zero. Furthermore, Ukraine still applies an export duty on sunflower seeds destined to the EU (10% in 2023, although according to Annex I-C EU-Ukraine AA it was supposed to be 2.7%). Therefore, the ATM regulation could not have had any direct impact on the oilseed imports to the EU. It was rather a competitive price on sunflower seeds originating from Ukraine which was a key factor for increasing imports.

5.3. PROPOSAL FOR THE ATMS IN 2024/2025

On 31 January 2024, the Commission issued a proposal to extend the ATMs for Ukraine until 5 June 2025, with further amendments.³⁶ According to Article 4(1) of the Proposal, the Commission may reintroduce customs duties on Ukrainian preferential imports if they adversely affect the market of one or several Member States. Thus, Ukrainian imports do not have to necessarily affect the entire EU market in an adverse way.

To tackle the concerns about surging imports of particular products, Article 4(7) of the Proposal introduces a special automatic safeguard mechanism for eggs, poultry, and sugar. Furthermore, provisional measures in case of emergency are to be imposed only upon a duly substantiated request from a Member State but shall not exceed 120 days (Article 4(5) of the Proposal). Thus, the EU Member States would hold an instrument to introduce a safeguard at a quick pace.

Nevertheless, the Proposal came under criticism of the EU agrarian lobby. In February 2024, the European farmer association published a Joint Statement calling for more safeguard measures in sensitive sectors, *inter alia* grain, to ensure further support for Ukraine and prevent unilateral measures.³⁷ Poland argued for an option of regional safeguard measures and for return to talks with the Ukrainian side on

³⁵ DG Agri at: https://circabc.europa.eu/sd/a/2c8378ab-c686-449d-9dd1-65371ab30889/Oil-seeds-dashboard_en.pdf (access date: 10 August 2024).

³⁶ European Commission, Proposal for a Regulation of the European Parliament and the Council on temporary trade-liberalisation measures supplementing trade concessions applicable to Ukrainian products under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, 31 January 2024, COM(2024) 50 final, 2024/0028 (COD)).

³⁷ The Council has chosen to ignore farmers' concerns regarding Ukraine ATMs; it is now imperative for the European Parliament to take action, joint press release, at: <https://cefs.org/wp-content/uploads/2024/02/Press-statement-The-Council-has-chosen-to-ignore-farmers-concerns-regarding-Ukraine-ATMs-it-is-now-imperative-for-the-European-Parliament-to-take-action.pdf> (access date: 22 February 2024).

gradual, reciprocal liberalisation of trade under the EU-Ukraine AA, accompanied by a gradual adaptation of Ukrainian agriculture to EU standards and law.³⁸

Due to this fact, although the Proposal was backed up by the Council and the Trade Committee in the Parliament, the European Parliament did not uphold the Commission's proposal and offered some amendments.³⁹ Among others, it was proposed that the destination for all consignments under the ATM regime had to be determined in advance and marked on the products prior to the import to the EU. Ukrainian authorities were to be responsible for the documentation accompanying products imported to the EU or in transit through the EU under the ATMs regime and to provide the Commission with all the necessary documentation certifying that those consignments reached their destination.⁴⁰ Moreover, additional safeguard measures for wheat, barley, maize and their products, sunflower and rapeseeds, oil and meal, as well as honey were proposed.⁴¹

On 20 March 2024, the Parliament and the Council reached a deal and agreed on the new ATM proposal.⁴² During the interinstitutional negotiations, it was agreed to reintroduce tariff-rate quotas if imports of poultry, eggs, sugar, oats, maize, groats and honey exceed the arithmetic mean of the quantities imported in the second half of 2021, 2022 and 2023. Additionally, the scope of the automatic safeguard mechanism was extended to include oats, maize, groats and honey, and the time period for activation of the automatic safeguard was shortened.⁴³

³⁸ https://www.parlament.gv.at/dokument/XXVII/EU/169670/imfname_11331853.pdf (access date: 10 August 2024).

³⁹ Committee on International Trade of the European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on temporary trade-liberalisation measures supplementing trade concessions applicable to Ukrainian products under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (COM(2024)0050-C9-0021/2024-2024/0028(COD)), 7 March 2024, A9-0077/2024.

⁴⁰ *Ibid.*, Art. 8, 8a.

⁴¹ *Ibid.*, Art. 4(7).

⁴² Ukraine: Council and Parliament reach a deal to renew EU's autonomous trade measures, Council of the EU, press release, at: <https://www.consilium.europa.eu/en/press/press-releases/2024/03/20/ukraine-council-and-parliament-reach-a-deal-to-renew-eu-s-autonomous-trade-measures/> (access date: 20 March 2024).

⁴³ Ukraine: Council backs the renewal of EU's autonomous trade measures, press release, at: <https://www.consilium.europa.eu/en/press/press-releases/2024/04/08/ukraine-council-backs-the-renewal-of-eu-s-autonomous-trade-measures/pdf/> (access date: 8 April 2024). See Art. 4(7) Regulation (EU) 2024/1392 of the European Parliament and of the Council of 14 May 2024 (*OJ L 29 May 2024*, pp. 1-6).

6. THE OPTIONS FOR UKRAINE

6.1. DISPUTE RESOLUTION OPTION

Chapter 14 EU-Ukraine AA establishes a bilateral dispute resolution mechanism that can be triggered if a party does not comply with its commitment under the trade chapter of the EU-Ukraine AA. Article 35 EU-Ukraine AA prohibits any bans, restrictions, or measures having an equivalent effect on the import of any good from the other party, unless authorised under Article XI GATT 1994. Article XI:1 GATT 1994 stipulates that no import restrictions besides duties may be imposed between WTO members. Given that the relevant provisions of the EU-Ukraine AA directly refer to WTO law, the appropriate forum for the dispute would be the WTO Dispute Settlement Body.

On 18 September 2023, Ukraine submitted claims within the WTO dispute settlement mechanism against Poland, Hungary, and Slovakia, alleging that their unilateral trade restrictions were inconsistent with Article XI:1, X:1, and V:2 GATT 1994 as well as Article 4.2. and 5 of the WTO Agreement on Agriculture.⁴⁴ Ukrainian arguments may prevail under WTO law, as justifying the unilateral import restrictions would require robust economic data and conformity with EU law – where the latter would not be met, as the EU has exclusive competence in external trade matters (Article 3(1)(e) TFEU).

Furthermore, since the Commission represents the Member States in the WTO, the EU should be a co-respondent in any dispute where the Member States introducing a measure in dispute may also participate in the proceedings. Ultimately, Ukraine cannot demand the EU to provide ATMs on specific terms but can only claim that the action of the EU or its Member States violates WTO law. Since the EU represents the Member States in the WTO, the EU could be held responsible for unilateral measures of a Member State. In the pre-Lisbon era, the European Communities did not rule out the possibility that claims of WTO inconsistency could be brought against individual EU Member States but tended to take responsibility for the actions of a Member State.⁴⁵

Given the complexity of the matter, there has been no development in the dispute. The WTO Dispute Settlement Body seems to be waiting for a political deal outside the WTO.

⁴⁴ *POLAND – MEASURES CONCERNING AGRICULTURAL PRODUCTS FROM UKRAINE, REQUEST FOR CONSULTATIONS BY UKRAINE*, 21 September 2023, WT/DS619/1, similar WT/DS621/1, WT/DS620/1.

⁴⁵ WTO Panel report *EC-IT Products*, WT/DS375/R WT/DS376/R WT/DS377/R, para. 7.76.

6.2. SELF-RESTRAINT BY UKRAINE

In early March 2022, Ukraine implemented zero export quotas for rye, oats, millet, buckwheat, salt, sugar, meat, and livestock, while introducing export licenses for wheat, maize, and sunflower oil. By mid-summer 2022, the *de facto* export ban for most agricultural products was converted to export licensing, and the regime of export licensing for wheat was lifted.⁴⁶

In 2023, no agricultural products were subject to export suspension.⁴⁷ Most cereals, oilseeds, processed oilseeds, and sugar required export licenses.⁴⁸ However, sugar export was temporally suspended in summer 2023, but in several days the ban was replaced by an export quota for 20 000 tons of sugar effective until mid-September.⁴⁹

After the EU import ban on cereals was discontinued in September 2023, the Commission assured that it would refrain from imposing any restrictions as long as effective export control measures by Ukraine were in place and fully operational.⁵⁰ Ukraine agreed to unilateral restrictions to control the export of goods in focus to prevent market distortions⁵¹ and introduced export licenses valid until the end of 2023 for wheat, maize, sunflower seed, and rapeseed being imported to Poland, Slovakia, Bulgaria, Romania, and Hungary, subject to approval of the government of the importing state.⁵² This special procedure was terminated at the end of October.⁵³ Since then, the number of companies eligible to export agricultural goods has been restricted, likely due to internal factors, namely administration of VAT refunds.⁵⁴ In November 2023, a draft law on minimum export prices for grain was circulated but has not yet been adopted.

Currently, there are no restrictions on sugar exports, whereas cereals, oilseeds, and their processed products are subject to export licenses.⁵⁵ Given the political

⁴⁶ See Government Regulations No. 207 of 5 March 2022, No. 259 of 12 March 2022, No. 352 of 24 March 2022, No. 422 of 9 April 2022, No. 549 of 3 May 2022, No. 279 of 1 July 2022, No. 832 of 26 July 2022.

⁴⁷ Government Regulation No. 1466 of 27 December 2022.

⁴⁸ *Ibid.*

⁴⁹ Government Regulation No. 545 of 30 May 2023, No. 684 of 7 July 2023.

⁵⁰ European Commission. Following the expiry of the restrictive measures on Ukrainian exports of grain and other foodstuff to the EU, Ukraine agrees to introduce measures to avoid a renewed surge in EU imports, press release, 15 September 2023, IP/23/4497.

⁵¹ *Ibid.*

⁵² Government Regulation No. 1020 of 19 September 2023.

⁵³ Government Regulation No. 1133 of 31 October 2023.

⁵⁴ Government Regulation No. 1132 of 31 October 2023.

⁵⁵ Government Regulation No. 1402 of 27 December 2023.

implications of a surge in certain imports from Ukraine to the EU, a more consistent and effective control mechanism for certain sensitive sectors may be beneficial. At the same time, this type of export self-restrictions may conflict with Article 31(1) EU-Ukraine AA, which prohibits the introduction of export duties, taxes, or other measures having an equivalent effect imposed on, or in connection with, the exportation of goods to the EU.

7. FINAL NOTES

Based on the above, several considerations can be suggested.

First, grain and oilseed exports from Ukraine will continue to be a major concern for the EU. Despite a decline in production for major export cereals in Ukraine, there has not been a corresponding decrease in exports as domestic consumption has fallen. For instance, wheat production significantly dropped from 33 million tons per year in 2021/2022 to 22.5 million tons in 2023/2024, while wheat exports only slightly decreased from 18.8 million tons in 2021/2022 to 17.7 million tons in 2023/2024.⁵⁶ Similarly, corn production fell down from 44 million tons in 2021/2022 to around 30 million tons in 2023/2024,⁵⁷ yet exports increased from 27 million tons in 2021/2022 to 29 million tons in 2023/2024.⁵⁸ Consequently, long-term solutions are needed from the EU, particularly larger TRQs,⁵⁹ legal approximation and standard harmonisation.

Second, a certain restoration of the Black Sea route can be observed, though the situation remains fragile. After Russia terminated the BSGI during the temporary import ban to the EU Eastern Member States in 2023, Ukraine was compelled to ship agricultural goods by sea despite continuous missiles attacks on its seaports, including storage infrastructure. Furthermore, as Russia is also a major grain exporter and requires the Black Sea route to export its own goods, there appears to be a mutual understanding that the Black Sea trade route benefits both Russia and Ukraine in exporting agricultural goods.

⁵⁶ USDA, FSA, p. 2, 10.

⁵⁷ *Ibid*, p. 2, 9.

⁵⁸ *Ibid*, p. 9.

⁵⁹ This issue has been actively discussed since 2016, see e.g. S. Taran, *How to Liberalise EU-Ukraine Trade under DCFTA: Tariff Rate Quotas*, Policy Brief, at <https://freepolicybriefs.org/2020/06/04/how-to-liberalise-eu-ukraine-trade-under-dcfta-tariff-rate-quotas> (access date: 10 August 2024); K. Zelenska, *EU-Zollkontingente: Ein Instrument zur Regulierung eines präferenziellen Handelsregimes*, [in:] AW-Prax/Bundesanzeiger Verlag, 04/2018, pp. 137-142.

Since October 2023, there has been an increase in sea shipments due to the weakening of Russia's position in the Black Sea. In January 2024, 60% of agricultural goods from Ukraine were exported by sea,⁶⁰ indicating that the initial destruction of traditional agricultural supply chains is at least partly overcome, and the use of the solidarity lanes for agricultural exports should be gradually reduced.

Third, agriculture is increasingly regarded as a significant factor in climate change. Therefore, it is a key part of the European Green Deal. The Common Agricultural Policy (CAP) plan for 2023-2027 foresees a greener and fairer CAP, which requires farmers to respect social standards and promote sustainability.⁶¹ It is expected that environmental standards in the EU will continue to rise, implicating additional responsibilities for EU agricultural producers. Consequently, the opinions and concerns of EU farmers should not be marginalized.

Forth, the intrinsic problems of EU agricultural policy must not be overlooked. The current situation highlights specific asymmetries in agricultural markets and the disadvantages of the CAP. When EU agricultural producers receive direct subsidies, the common market must be protected by tariffs or non-tariffs measures with a similar effect to maintain high market prices. Moreover, direct payments to producers do not encourage investment, while efficient infrastructure is crucial for adapting to market conditions. Hence, a step-by-step elimination of agricultural subsidies in the EU is inevitable.

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⁶⁰ <https://www.euractiv.com/section/agriculture-food/news/ukraines-grain-exports-via-black-sea-route-back-to-2023-levels/> (access date: 10 August 2024).

⁶¹ https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-2023-27_en (access date: 10 August 2024).

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