

MEP T. Waitz
Parlement européen
Bât. Altiero Spinelli
05F364
60, rue Wiertz
B-1047 Bruxelles
(thomas.waitz@ep.europa.eu)



By E-mail

May 14, 2019

Re: Inaccuracies in Shifting Values' Briefing , "MHP Poultry Trade Issue"

Dear Member of the European Parliament Mr. Waitz,

We write to express our concerns in respect of the paper entitled "Briefing MHP Poultry Issue" ("Briefing Paper") prepared by Shifting Values, which we understand you are circulating among policy makers and stakeholders. The Briefing Paper contains erroneous and misleading statements of fact and inaccurate legal arguments in respect of our members' exports of poultry cuts to the European Union and the DCFTA between the EU and Ukraine.

In particular, we are concerned about a number of misleading statements and suggestions in the Briefing Paper. We are particularly concerned that the Briefing Paper:

- alleges that Ukrainian poultry producers cheated – whereas they merely used a trade concession granted under the DCFTA;
- suggests that the products in question were wrongly classified – whereas EU customs law makes it clear that they were correctly classified;
- states that the poultry agreement favors Ukraine – whereas in fact it is very beneficial to the EU, and alternative "solutions" proposed by Shifting Values would be unlawful and open the EU to significant risk of much greater market access; and
- misrepresents EU audits of poultry production in Ukraine as highlighting significant concerns, by using outdated reports and quoting selectively – whereas recent audits show that Ukraine has resolved all but one of the EU's limited concerns.

For your benefit, we have explained our concerns on these points in detail below. We very much hope that you ensure that the Briefing Paper is amended accordingly, and look forward to working with you and other EU policy makers to ensure that the DCFTA continues to provide mutual benefits for EU and Ukrainian producers.



- **MHP is a leading poultry company known for its quality, efficiency and sustainability**

The Briefing Paper unfairly targets one of our members, MHP, a global poultry company known for its quality, efficiency and sustainability. MHP is a company publicly traded in the London Stock Exchange and built on the basis of the guidelines of the World Bank's International Finance Corporation. It is governed by a Board of Directors with Non-Executive Directors that are world experts on the poultry industry and veterinary issues.

MHP is hundred per cent compliant with EU food safety and animal welfare standards and does business subject to the same high standards as any other European producers. Its facilities are regularly audited by the European Commission's Directorate General for Health and Food Safety ("DG SANTE") and by international organizations under international standards, such as BRC Food Safety and FSSC 22000 Food.

- **The Briefing Paper's allegations of cheating are unfair: our members merely used a trade concession granted under the DCFTA**

Of most concern is that the Briefing Paper unfairly suggests that Ukrainian exporters of poultry have been cheating by *"exploiting (if not creating) a loophole in the Association Agreement"* between the EU and Ukraine. As further explained below, our members exporting poultry cuts to the EU have not done anything illegal or wrong, but only used a trade concession that the EU granted to Ukraine in return for many other trade concessions that Ukraine granted the EU under the DCFTA.

- **The Briefing Paper is misleading as to what was imported and when**

From a factual point of view, the Briefing Paper implies, incorrectly, that in 2015 and 2016 Ukraine exported "breast cap with the humerus bones of the wings attached" under CN tariff line 0207 13 50. The Paper states that *"[I]nterestingly, when The Netherlands started importing chicken breast with bone from Ukraine in 2015, these imports were classified as 0207 13 50. This continued until June 2016 when imports suddenly stopped under 0207 13 50 and commenced under 0207 13 70."*

However, the Briefing Paper provides no evidence to support such statement on Ukrainian exports of "breast cap with the humerus bones of the wings attached" prior to June 2016. The Eurostat data that is mentioned in the Paper simply suggests that in 2015 and between January and June 2016, Ukraine exported to the Netherlands virtually no product under CN tariff line 0207 13 70 and that it exported around 535.8 tons of poultry cuts under tariff line 0207 13 50. Yet, this data provides no information as to whether any of the tons of poultry exported under tariff line 0207 13 50 were "breast cap with the humerus bones of the wings attached."

- **The products at issue ("breast cap with the humerus bones of the wings attached") are correctly classified under tariff line 0207 13 70**

In fact, it would have been legally impossible for Ukraine to export "breast cap with the humerus bones of the wings attached" under tariff line 0207 13 50 simply because such cuts would not be classified under that same tariff line by the European customs authorities.

- **EU customs law is clear that the products at issue cannot be classified under tariff line 0207 13 50**

Indeed, the Briefing Paper fails to understand that under EU customs law the poultry cut “breast cap with the humerus bones of the wings attached” must be classified under tariff line 0207 13 70. As the Briefing Paper admits, Additional Note 4(e) of Chapter II of Part Two of the Combined Nomenclature defines “breasts,” for the purposes of tariff lines 0207 13 50 as “poultry cuts consisting of the sternum and the ribs distributed on both sides of it, together with the surrounding musculature.” The poultry cuts “breast cap with the humerus bones of the wings attached” do not meet this definition of breast because they also contain the humerus with muscle mass. Contrary to what the Briefing Paper states, Additional Note 4(e) was not introduced capriciously by Commission Regulation (EU) 2018/1602, but has been part of the Combined Nomenclature for many years.

In fact, the actual wording of the tariff lines in heading 0207 13 confirms that tariff line 0207 13 50 cannot include “breast cap with the humerus bones of the wings attached.” When the CN intends to include a poultry part attached to another within a subheading referring to a specific poultry part, it explicitly indicates this in the subheading, as this wording suggests. For example, subheadings 0207 13 40 and 0207 14 40 explicitly include “backs, necks, backs with necks attached, rumps and wing-tips” (emphasis added). In contrast, tariff line 0207 13 50 only refers to “breasts and cuts thereof.” “Cuts thereof” means that only cuts obtained from the (whole) breast are covered by these subheadings, and not breasts still attached to other parts.

Moreover, it cannot be argued that tariff line 0207 13 70 is merely intended to include chicken parts of limited value because their *erga omnes* duty is significantly higher than the duties applicable under related subheadings. For example, while products classified under subheadings 0207 13 70 and 0207 14 70 are subject to *erga omnes* duties of 100.80 Euro per 100 Kg, subheadings 0207 13 50 and 0207 14 50 – breast cuts – attract *erga omnes* duties of 60.20 Euro per 100 Kg.

- **Three BTI Decisions confirm that the product at issue falls under tariff line 0207 13 70**

As the Briefing Paper acknowledges, a Binding Tariff Information (“BTI”) Decision of the Netherlands confirms that the “breast cap with the humerus bones of the wings attached” fall under tariff line 0207 13 70 on grounds “*because of the presence of the humerus with muscle mass, the sample does not satisfy the definition of breast with bone in [...] The product is considered to be chilled other cut with bone in.*”¹ You may be aware that an additional BTI Decision of the Dutch customs authorities² and two BTI Decisions of the Slovak customs authorities have also reached the same conclusion,³ which further affirms that the Dutch customs authorities as well as our members were correct when they concluded that “breast cap with the humerus bones of the wings attached” fall under tariff line 0207 13 70.

¹ Binding Tariff Information Decision NLRTD-2017-0772 of the Dutch Customs Authorities of 10 August 2017.

² Binding Tariff Information Decision [NLBTI2018-0483](#) of the Dutch Customs Authorities of 20 July 2018.

³ Binding Tariff Information Decision [SK457410/17/139](#) of the Slovak Customs Authorities of 12 May 2017 and Binding Tariff Information Decision [SKBTI250355706/18/344](#) of the Slovak Customs Authorities of 13 June 2017.

- **It was perfectly lawful for our members to export the product in question under tariff line 0207 13 70 before receiving a BTI Decision**

The Briefing Paper also fails to understand the value of BTI Decisions when it suggests that MHP did not play by the rules when they started to export poultry cuts of "breast cap with the humerus bones of the wings attached" before the Netherlands issued its BTI Decision. Indeed, the Paper states that "*it remains unclear, how MHP managed to export chicken breast with bone under 0207 13 70 for more than one year, before the first Binding Tariff Information was issued. Has there been a BTI issued in June 2016, which is no longer in the BTI database?*"

What the Briefing Paper omits is that BTI Decisions are not a pre-requisite for customs authorities and operators to classify products under a particular tariff line or another for customs purposes. BTI Decisions are solely intended to facilitate customs procedures by enabling operators with particular certainty where there are doubts as to the classification. A BTI decision "*is primarily intended to provide an optional means of assistance to improve certainty as regards the customs treatment of goods by the customs authority.*"⁴ Thus, our members were correct to export to the EU poultry cuts of "breast cap with the humerus bones of the wings attached" under tariff line 0207 13 70 independently of when the customs authorities of the Netherlands or any other Member State adopted the BTI Decisions that simply confirmed that the classification of the product under 0207 13 70 was correct.

- **The Briefing Paper misrepresents the poultry agreement as favouring Ukraine – when in fact it is very beneficial for the EU**

The Briefing Paper also misrepresents the recently agreed poultry agreement between Ukraine and the EU and the impact that such agreement will have on the trade practices of our members. Among other things, the Paper states that "*[I]f agreed, the new scheme would reward MHP and their helpers in EU member States for exploiting (if not creating) a loophole in the Association Agreement.*"

These statements, however, do not acknowledge the fact that the poultry agreement is very beneficial to the EU. As explained, customs authorities currently agree that the poultry cuts of "breast cap with the humerus bones of the wings attached" fall under tariff lines 0207 13 70, and therefore, Ukraine is entitled under the DCFTA to export an unlimited amount of cuts of "breast cap with the humerus bones of the wings attached" subject to zero duties. This is part of the overall balance of the DCFTA, under which both Ukraine and the EU granted each other significant trade concessions.

The agreement would amend the DCFTA in a way that is beneficial to the EU and EU poultry producers. In return for a limited 50,000 ton increase of the quota, Ukraine will agree to include tariff line 0207 13 70 within the quota, thereby closing off its current unlimited market access for imports of "breast cap with the humerus bones of the wings attached."

⁴ Opinion of Advocate General Kokott, 4 February 2016, Schenker Nemzetközi Szállítványozási és Logisztikai Kft. v Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága, C-409/14, ECLI:EU:C:2016:76, Para. 137.



Furthermore, we note that, partly as a result of the DCFTA, Ukraine had a trade deficit with the EU in 2018 (*i.e.*, Ukraine imported more from the EU than it exports to the EU) of around 4.2 billion Euro. In the specific sector of poultry, Ukraine is also a net importer of EU poultry products: in 2017, the EU exported 163,057 tons of poultry to Ukraine, while it imported 80,083 tons, including duty free and non-duty free imports, from Ukraine.

- **Ukrainian producers will not be in a position to export the product in question under tariff line 0207 13 50, for the reasons outlined above, and because the tariffs in place above the quota make it uneconomical**

The Briefing Paper also questions "*Why should MHP export quantities in excess of the volume of the tariff rate quota under 0207 13 70, while the duty for 0207 13 50 is only 60.2 Euro/100 kg? Instead, they would likely switch back to classifying their cuts as 0207 13 50.*"

Such reasoning fails to understand that the differences between 0207 13 50 and 0207 13 70 will become irrelevant with the new agreement, because products falling under any of the two tariff lines will be subject to the same limited zero duty quota.

As a farmer, you will be aware that it is virtually impossible to market any poultry product in the EU if it is subject to a prohibitively high tariff duty of 60,2 Euro/100 kg. Thus, once the quota is reached, it will be commercially impossible for MHP and other Ukrainian poultry producers to export any product to the EU regardless of whether it is under tariff line 0207 13 50 or 0207 13 70.

- **The Briefing Paper's suggestions that the EU should reclassify the product in question as "breasts" would breach the DCFTA and WTO rules, and lead to claims against the EU from various trading partners for compensation**

We are also very concerned by the Briefing Paper's suggestion that rather than ratifying the poultry agreement with Ukraine, the Commission should annul the Dutch BTI Decision by "*amending the definition of 'breast' in the Additional Note 4(e) to Chapter 2 of the Combined Nomenclature and/or by requesting Member States to revoke their decisions.*" Such a suggestion is unfortunate and irresponsible, as amending the definition of "breast" in Additional Note 4(e) would very likely constitute a breach of DCFTA and WTO rules, and would result in a violation of the rights of Ukraine and other third countries – which the EU would then have to compensate.

In effect, Article 29 of the DCFTA requires the EU to reduce or eliminate its customs duties on goods originating in Ukraine in accordance with the schedules of commitments to the DCFTA. Article 30 also prohibits the EU from increasing its customs duties above what is agreed in the schedules. These clauses are standard language for EU trade agreements. A change in the definition of "breast" would be a violation of Articles 29 and 30 of the DCFTA because it would subject the poultry cut "breast cap with the humerus bones of the wings attached," to a customs duty higher than what was agreed under the DCFTA.

The Briefing paper's proposed "solution" would not only be unlawful, but would open the EU poultry sector to a significant risk of greater market access from Ukraine, for five reasons:

1. As already explained, under the DCFTA, the EU agreed to grant Ukraine a zero duty to imported poultry cuts classified under subheadings 0207 13 70 (and 0207 14 70). This



zero duty was a major concession to Ukraine. It contrasts with the same tariff lines' *erga omnes* duty of 100.8 Euro per 100 Kg, and the other tariff lines 0207 13 [or 14] 20 to 60 of the DCFTA, which impose duties between 18.5 Euro and 60.2 Euro per 100 kg, and for which the DCFTA only grants a duty free quota of 17,600 tons in 2018.

2. Three BTI Decisions of the Netherlands and Slovakia confirm that the cut "breast cap with the humerus bones of the wings attached" fall under tariff line 0207 13 70 (and 0207 14 70). They all confirm Ukraine's legitimate expectation that, as a result of the DCFTA, our members and manufacturers will be able to export "breast cap with the humerus bones of the wings attached" subject to a zero duty and with no quota limitation to the EU.
 3. Reclassification of the cut "breast cap with the humerus bones of the wings attached" under a tariff line other than 0207 13 70 (or 0207 14 70) as the result of an amendment of the definition of "breast" of Additional Note 4(e) would result in significant tariff duties and/or quotas that would *de facto* prevent future EU imports of the cut to from Ukraine. Any changes to the definition of "breast" or other non-agreed forms of reclassifying the poultry cuts would, thus, result in a violation of the DCFTA for which the EU would have to compensate Ukraine.
 4. The Briefing Paper's proposed solution to amend the definition of "breast" of Additional Note 4(e) would also likely require the EU to compensate other countries under the WTO Agreements. As you and Shifting Values are doubtless aware, an amendment of Explanatory Note 4(e) would affect imports of poultry cuts from all countries members of the WTO, and not only Ukraine. A change in the classification of EU imports of poultry of all those countries may result in increased tariff duties for which the EU would have to compensate each trade partner.
 5. The Briefing Paper's proposed solution would be open to legal challenge by Ukraine before the WTO, for all the reasons stated above. This would present a much more significant risk to EU poultry farmers than a mere increase of 50,000 tons in market access. Indeed, previous such challenges brought before the WTO Dispute Settlement Body to similar attempts by the EU to reclassify certain poultry products led to much greater market access being granted in 2006 to Brazil (336,107 tons) and Thailand (252,643 tons), subject to very low duties.⁵ Conversely, the poultry agreement reached between the EU and Ukraine resolves the EU's concerns at these lawful imports in a manner that is consistent with its WTO obligations, and give certainty to our members.
- **The Briefing Paper misrepresents EU audits of poultry production in Ukraine as highlighting significant concerns**

The Briefing Paper also refers in a misleading manner to outdated European Commission reports of its audits of poultry production in Ukraine, and selectively quotes criticisms, out of context.

⁵ See DS269: European Communities – Customs Classification of Frozen Boneless Chicken Cuts, available online at <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds269_e.htm>.

- **The Briefing Paper misleadingly relies on ten-year-old data**

In particular, the Paper states that a Commission report of 2010 identified “deficiencies in relation to hanging and stunning of birds” and that it concluded that “[O]fficial controls cannot guarantee that EU animal welfare requirements (on stunning in particular) are met for poultry entering the EU export production chain as the application of national provisions effectively prevent their application.”

- **The Briefing Paper only quotes negative conclusions, out of context**

Where it does quote a more recent 2018 report, the Briefing Paper is also selective, quoting only negative findings out of context. It states that the Commission’s audit of 2018 “found that significant deficiencies in some establishments approved for export to the EU were either not identified or not recorded and consequently not corrected, thereby undermining the reliability of the guarantees that only establishments which meet EU requirements are approved and maintained on the EU list.”

- **The more recent 2018 audit found only four areas of concern on which the Commission made recommendations ...**

Unfortunately, the Briefing Paper misleadingly omits to state that the audit of 2018 concluded that the “action plan in response to the recommendations following the 2010 audit has been implemented by [Ukraine] satisfactorily” except for four issues/areas for which the 2018 Report provided recommendations. These four areas were: (i) the level of knowledge of the competent authority staff on EU requirements; (ii) the performance and effectiveness of official controls; (iii) the compliance of establishments with EU rules; and (iv) procedures in place for de-listing of establishments for EU export.

Thus, contrary to what the Briefing Paper misleadingly suggests, the conclusions of the 2018 report clearly indicate that much of the deficiencies identified nine years ago and before the entry into force of the DCFTA have been corrected, and that any residual issues are only marginal.

- **... and the latest February 2019 audit found “significant improvement”, as Ukraine had addressed three of those four areas of concern – including animal welfare**

In fact, you may be aware that a Commission report of an audit on Ukrainian poultry producers that it performed in February 2019 concludes that, in the last year, “significant improvement” has been made in the four areas identified in 2018, and that three of these former concerns, including animal welfare, were “satisfactorily addressed.” While the report indicates the need for further progress on the procedures to de-list establishments for EU export, the report recognizes that, nevertheless, Ukrainian authorities “frequently suspend the certification in non-compliant establishments to prevent products from these establishments to be exported to the EU.”

Since this latest report acknowledges the competence and adequacy of the Ukrainian authorities, we have no doubt that Ukrainian exports of poultry products comply with both EU animal food safety and welfare standards.

Re: Inaccuracies in Shifting Values' Briefing, "MHP Poultry Trade Issue"



- **Ukrainian poultry farmers value the broader EU-Ukraine relationship, and support the amendment of the DCFTA by the poultry agreement**

In closing, we would like to emphasize that we very much value our relationship with the European Union and – as fellow farmers – we also understand the need of EU poultry producers to have assurances on the amount of Ukrainian poultry cuts that may be imported duty free into the EU. We also wish to ensure certainty of supply for our EU-based customers, and to avoid any potential trade disruptions. For these reasons, we strongly support the EU's and Ukrainian ratification of the recent poultry agreement as a way to improve the DCFTA.

We look forward to working with you and other EU policy makers and stakeholders to ensure that the DCFTA continues to provide opportunities and mutual benefits for both EU and Ukrainian poultry producers.

Yours sincerely,

On behalf of the Poultry Union of Ukraine
Executive Director Sergii Karpenko

cc: Nicolas Entrup
Ferrogasse 5/3
1180 Vienna
Austria
(contact@shiftingvalues.com)