

BRUSSELS MONITOR

A Weekly Review of EU Trade Policy Developments Affecting Japan

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I. WTO Watch

US, EC and Japan press China on export restraints and non-tariff restraints to imports

On 22 September 2009, in three separate communications, the US, the EC and Japan requested information on Chinese export restraints on raw materials and certain non-tariff restraints on imports.

It should be recalled that, in June 2009, the US and the EC requested WTO dispute settlement consultations with China regarding the latter's export quotas, export duties and/or other export restraints on nine raw materials, namely, bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc. Mexico subsequently requested WTO dispute settlement consultations with China regarding these same export restraints in August 2009.

The US communication expresses concern that China has continued to impose export restraints on raw materials and, in many cases, made them more restrictive. The communication focuses in particular on China's Ministry of Industry and Information Technology (MIIT) report, which has called for stricter export restraints on rare earths. China currently accounts for more than 95% of the world's annual mining output of rare earths, which are primarily used in high-technology products of vital importance to the US economy, such as hard-disk drives, mobile phones, plasma TVs, catalytic converters, navigation systems and missiles, as well as in green technologies. MIIT was reportedly proposing a total ban on exports of dysprosium, lutetium, terbium, thulium and yttrium, and a reduction in the export quota on other rare earths, on top of current export duties of 25% on all rare earths.

For its part, the EC has not expressly raised the issue of China's restraint on exports of rare earths, although the EC does reiterate its general disappointment with China's policy in the field of raw materials. The EC communication also raises issues relating to the Chinese Compulsory Certification Regulation, under which European exporters are encountering growing difficulties. The EC is also alleging that the Chinese authorities are delaying the approval of certain molecules for the National Drug Reimbursement List (NDRL). Since only products on the NDRL can be reimbursed, failure to update it puts more recent and innovative drugs at a competitive disadvantage. The EC claims that failing to update the NDRL on a regular basis has a disproportionate negative impact on imported products.

The communications reflect the growing concerns of the world's leading industrial powers with Chinese government practices of using export and non-tariff import restrictions to allegedly gain an advantage in international trade. The US observes in particular that restrictions on exports of certain commodities have resulted in a decline of prices on Chinese domestic market, giving China's downstream producers a significant competitive advantage over foreign downstream producers. It can be expected that the issue of China's restraints on rare metal exports may have particularly broad implications in the future, due to China's almost complete monopoly on their production, as well as the importance of rare metal to many key industries in the US, the EU and Japan.

II. *European Union: Trade*

EU establishes sectors exposed to “carbon leakage” including those for textiles, clothing, footwear and electronics

On 18 September 2009, EU Member States approved a draft Decision listing 164 industrial sectors and sub-sectors considered to be exposed to “carbon leakage”. The aim of Decision is to prevent companies in industrial sectors that are subject to strong international competition from being driven to relocate to third countries with less stringent constraints on greenhouse gas emissions. Under the revised EU Emissions Trading System (“EU ETS”) which is due to apply from 2013, installations within the EU in identified sectors will receive a greater share of greenhouse gas emission allowances free of charge in comparison to other industrial sectors.

The sectors deemed to be facing a significant risk of carbon leakage include the manufacture of a wide range of products. The list has been put together with reference to detailed criteria on CO₂ costs and trade exposure. Products currently on the list that may be of particular interest include games and toys, textiles, clothing products, footwear and electronic items. Products and manufacturing methods cited include the following:

- certain manufacturing or processing of textile products (from the preparation of flax-type fibres and cotton-type weaving to the manufacture of made-up textile articles, carpets, rugs, knitted and crocheted fabrics and the tanning and dressing of leather);
- certain clothing articles (e.g., knitted and crocheted pullovers, cardigans and similar articles, work-wear, outerwear, underwear, accessories and other wearing apparel) and leather clothes;
- luggage, handbags and the like;
- footwear;
- perfumes and toilet preparations and essential oils;
- ceramic products (e.g., household and ornamental articles and sanitary fixtures);
- machinery (including the manufacture of items from portable hand held power tools to machinery for textile, apparel and leather production);
- electric domestic appliances;
- office machinery;
- computers and other information processing equipment;
- accumulators, primary cells and primary batteries;
- lighting equipment and electric lamps;
- other electrical equipment;
- television and radio receivers, sound or video recording or reproducing apparatus and associated goods;
- jewellery and related articles (including imitation jewellery);
- musical instruments;
- sports goods; and
- games and toys.

The importance of this draft Decision is that, by receiving a higher share of greenhouse gas emission allowances free of charge, installations in these sectors should be able to maintain competition with imports from overseas in these sectors. The move is intended to provide advantages to these sectors in the EU, in order to level the playing field.

Under the EU ETS Directive, industrial sectors will receive 80% of benchmarked allowances for free in 2013 decreasing annually to 30% in 2020. Those sectors which are deemed to be exposed to carbon leakage and are included on the final list when the draft Decision is adopted will receive 100% of benchmarked allowances for free.

This does not mean that the exposed sectors will be totally exempt from the EU ETS: EU manufacturers will still have to meet the benchmarks to ensure that their installations are efficient enough to receive the free allowances.

With talks on the United Nations Framework Convention on Climate Change set to take place in early December, the Commission has acknowledged that the issue of carbon leakage could be partially addressed by international agreements. If concessions are made which would lessen the burden on certain sectors, amendments to the list in the draft Decision will be made. However, if the list is not revised it will apply until 2014. Any new sectors added later would receive free emission allowances for the 2015 to 2019 period.

The draft Decision must pass the scrutiny of the European Parliament and the Council, with both expected to amend and/or adopt the Decision by year's end. A copy of the draft Decision can be found at:

http://ec.europa.eu/environment/climat/emission/pdf/draft_dec_carbon_leakage_list16sep.pdf.

III. EC Competition

Intel decision and summary of appeal made public

On 21 September 2009, the Commission published the non-confidential version of its *Intel* decision of 13 May 2009. A summary of the decision was subsequently published in the Official Journal of 22 September 2009. These materials confirm that the Commission has challenged two specific practices: (i) Intel's alleged grant of wholly or partially secret rebates to computer manufacturers on the condition that they bought all, or almost all, of their x86 CPUs from Intel rather than from Advanced Micro Devices (AMD), and the making of direct payments to at least one major retailer on the condition that it stock only computers featuring Intel's x86 CPUs (this practice is referred to as "conditional rebates"); and (ii) Intel's alleged direct payments to computer manufacturers to halt or delay the launch of specific products containing competitors' x86 CPUs, and to limit the sales channels available to these products (this practice is referred to as "naked restrictions").

With respect to conditional rebates in particular, the Commission decision established that the practices at issue met the conditions of the case-law for finding an abuse. The Commission then conducted an economic analysis to demonstrate that the rebates had the capability of foreclosing an "as-efficient" competitor (an analysis which is said to be independent of whether AMD was actually able to enter the market).

In a related development, details of Intel's appeal against the Commission decision were published in the Official Journal of 12 September 2009. Intel contends, among others, that the Commission erred in law by failing to establish that its discount scheme had an actual capability to foreclose competition and by failing to analyse whether its rebate arrangements were implemented in the territory of the European Community and/or had immediate, substantial, direct and foreseeable effects within the European Community. Intel also argues that the Commission failed to meet the required standard of proof by failing to show that Intel's rebate arrangements were conditional upon

its customers purchasing all or almost all of their requirements from Intel. Intel further claims that the Commission committed numerous errors in applying its “as efficient competitor” test to determine whether Intel’s rebates were capable of restricting competition, and failed to take account of various categories of evidence. In addition, Intel claims that the Commission infringed essential procedural requirements which materially infringed its rights of defence, and challenges the level of the fine imposed.

IV. European Union: Regulatory

Commission investigation finds online electronics retailers mislead consumers

Sellers of consumer electronic devices may wish to be alerted to an announcement made on 9 September 2009, by EU Consumer Commissioner Meglena Kuneva, concerning the results of an EU-wide investigation involving 26 of the 27 Member States, and aimed at possible misleading advertising and deceptive advertising practices on websites selling electronic consumer goods. The investigation, which analysed a sample group of 369 online electronics retailers, found that a large number of the sites violated EU consumer protection rules.

According to Commissioner Kuneva, the investigation was deemed necessary after her office began receiving an unusually large number of complaints from consumers related to the sale of electronic devices over the internet. Ms Kuneva noted that online sales have quickly grown into an important sales channel for electronic devices, with nearly one in four EU consumers who have ever made a purchase online having purchased an electronic device online.

The investigation focused on assessing compliance with three consumer protection directives: Directive 1997/7 on distance contracts, Directive 2005/29 on abusive commercial practices and Directive 2000/31 on e-commerce. The Commission coordinated the investigation with 26 of the 27 Member State consumer protection authorities (Slovakia did not participate due to a lack of available personnel as a result of other ongoing market surveillance), in addition to the relevant authorities in Norway and Iceland.

The 369 websites included in the sample were chosen on the bases of size and of previous complaints to the Commission. The sample included more than 200 of the largest internet retailers, and more than 100 sites as a result of previous complaints. The targeted websites sold six of the most popular electronic consumer goods – digital cameras, mobile phones, personal music players, DVD players, computer equipment and video game consoles. While the Commission has not made public the specific sites which were targeted (due to differing rules regulating such disclosure in different Member States), Iceland, Norway and Latvia have all made public the names of sites within their jurisdiction subject to the investigation (see: link below). At least some additional Member States are expected to do the same at a later stage in the investigation.

According to Ms Kuneva’s report, a substantial majority of all of the sites surveyed were found to have provided misleading or insufficient information to consumers, thus leaving these sites open to possible national enforcement proceedings.

In particular, 66% of the sites reportedly failed to inform consumers that, by law, they have at least seven days (depending on the jurisdiction) to return any purchased product without giving a reason, for a full reimbursement. While some sites simply failed to indicate this right, other sites provided more restrictive returns policies which were not acceptable under EU law. Additionally, 45% of the

sites presented misleading information about the total price to be charged for items. EU law requires that consumers be informed of the total price of items, including taxes and delivery costs. Finally, 33% of the targeted sites did not provide complete contact details for the business in question. This omission hinders consumers' ability to effectively make complaints and/or return unwanted or defective items.

While the first phase of the investigation has been completed, the Commission has not yet taken any enforcement action or contacted possibly infringing businesses. These actions will be taken in a second phase, in which national enforcement authorities will contact businesses and provide them with an opportunity to rectify misleading statements or omissions. If businesses fail to remedy problems brought to their attention, the Commission will direct national enforcement authorities to take action under national law. The Commission has announced that it will present the results of this second phase in mid-2011.

For further information, and to obtain the lists of websites targeted in Iceland, Latvia and Norway, businesses may wish to visit the following link:

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/379>.

V. Dumping Watch

A. Initiation of expiry review of anti-dumping measures – glyphosate

On 29 September 2009, the Official Journal published a notice of initiation of an expiry review of anti-dumping measures applicable to imports of glyphosate originating in the People's Republic of China.

The product under review is glyphosate originating in the People's Republic of China, currently falling within CN codes ex 2931 00 95 and ex 3808 93 27.

It may be recalled that the measures currently in force are a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China imposed following an expiry review by Regulation 1683/2004, as extended by Council Regulation 163/2002 to imports of glyphosate consigned from Malaysia (whether declared as originating in Malaysia or not) and as extended to imports of glyphosate consigned from Taiwan (whether declared as originating in Taiwan or not). By Commission Decision 2009/383/EC these measures were suspended with effect on 16 May 2009 for a period of nine months.

The request was lodged on 29 June 2006 by the European Glyphosate Association on behalf of producers representing a major proportion, in this case more than 70%, of the total Community production of glyphosate. The request is based on the grounds that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury to the Community industry.

All interested parties, if their representations are to be taken into account during the investigation, must make themselves known by contacting the Commission, present their views and submit questionnaire replies or any other information within 37 days of the date of publication of the notice in the Official Journal. All interested parties may also apply to be heard by the Commission within the same 37-day time limit.

The Commission may decide to apply sampling. All interested parties wishing to submit any relevant information regarding the selection of the sample must make themselves known by contacting the Commission and providing the information on their company or companies as specified by the notice. Certain information relevant for the selection of the sample should reach the Commission within 15 days of the date of publication of the notice in the Official Journal and all other information must reach the Commission within a period of 21 days of the date of publication.

The investigation will be concluded within 15 months of the date of the publication of the notice.

B. Termination of new exporter review– hand pallet trucks and their essential parts

On 1 October 2009, the Official Journal published Council Regulation 913/2009 terminating the new exporter review of Regulation 1174/2005 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of hand pallet trucks and their essential parts originating in the People's Republic of China, re-imposing the duty with regard to imports from one exporter in this country and terminating the registration of these imports.

The product concerned is hand pallet trucks and their essential parts, i.e., chassis and hydraulics, originating in the People's Republic of China, currently falling within CN codes ex 8427 90 00 and ex 8431 20 00. Hand pallet trucks are defined as trucks with wheels supporting lifting fork arms for handling pallets, designed to be manually pushed, pulled and steered, on smooth, level, hard surfaces, by a pedestrian operator using an articulated tiller. The hand pallet trucks are only designed to raise a load, by pumping the tiller, to a height sufficient for transporting and do not have any other additional functions or uses such as for example (i) to move and to lift the loads in order to place them higher or assist in storage of loads (highlifters); (ii) to stack one pallet above the other (stackers); (iii) to lift the load to a working level (scissor lifts); or (iv) to lift and to weigh the loads (weighing trucks).

It is recalled that that the measures currently in force are a definitive anti-dumping duty and definitively collected the provisional duty imposed on imports of hand pallet trucks and their essential parts originating in the People's Republic of China imposed by Council Regulation 1174/2005.

The Commission subsequently received a request to initiate a new exporter review of Regulation 1174/2005 from Crown Equipment (Suzhou) Company Limited, an exporting producer of hand pallet trucks and their essential parts originating in the People's Republic of China. The applicant alleged that it did not export the product concerned to the Community during the period of investigation on which the anti-dumping measures were based and that it is not related to any of the exporting producers of the product concerned which are subject to the abovementioned anti-dumping measures. The Commission examined the *prima facie* evidence submitted by the applicant and considered it sufficient to justify the initiation of a 'new exporter' review.

Having determined, after consulting the Advisory Committee, that sufficient evidence existed to justify the initiation of a new exporter review, by Regulation 52/2009 the Commission initiated the review of Regulation 1174/2005 with regard to the applicant.

By letter to the Commission dated 22 May 2009, Crown Suzhou formally withdrew its request for a new exporter review. It was considered whether it would be warranted to continue the investigation *ex officio*. The Commission considered that the termination of the investigation would not affect the anti-dumping measure in force, that the duty rate applicable to all other companies would be re-

imposed retroactively on Crown Suzhou and that such termination would not be against the Community interest. On this basis, the investigation was terminated.

The anti-dumping duty applicable to the applicant will be levied retroactively from the date of initiation of the review on imports of the product concerned which have been made subject to registration.

Council Regulation 913/2009 entered into force on 2 October 2009.

C. Initiation of anti-dumping proceeding and review of anti-dumping measures – ironing boards

On 2 October 2009, the Official Journal published a notice of initiation of an anti-dumping proceeding concerning imports of ironing boards originating in the People's Republic of China, limited to one Chinese exporting producer, Since Hardware (Guangzhou) Co. Ltd, and of initiation of a review of the anti-dumping measures on imports of ironing boards originating in the People's Republic of China.

The product concerned is ironing boards, whether or not free standing, with or without a steam soaking and/or heating top and/or blowing top, including sleeve boards, and essential parts thereof, i.e. the legs, the top and the iron rest originating in the People's Republic of China, currently falling within CN codes ex 3924 90 90, ex 4421 90 98, ex 7323 93 90, ex 7323 99 91, ex 7323 99 99, ex 8516 79 70 and ex 8516 90 00.

It is recalled that the complaint was lodged on 20 August 2009 by three Community producers representing a major proportion, in this case more than 50%, of the total Community production of ironing boards. The complainants allege that imports of ironing boards, originating in the People's Republic of China and produced by Since Hardware (Guangzhou) Co. Ltd ("Since Hardware"), are being dumped and are thereby contributing to the material injury of the Community industry.

In the anti-dumping investigation concerning imports of ironing boards, following which measures were imposed by Council Regulation 452/2007, the Commission established that dumped imports of ironing boards had caused material injury to the Community industry. These findings were based on an assessment of the effects of all imports from the People's Republic of China and Ukraine, excluding imports of ironing boards produced by Since Hardware. The complainants allege that if Since Hardware's imports were included in the injury analysis, the volume and market share of dumped imports would show a more pronounced injury picture.

The investigation will determine whether the product concerned originating in the People's Republic of China and produced by Since Hardware is being dumped and whether this dumping has contributed to injury.

All interested parties should request a questionnaire or other claim forms as soon as possible, but not later than 10 days after the publication of the notice in the Official Journal. All interested parties, if their representations are to be taken into account during the investigation, must make themselves known by contacting the Commission, present their views and submit questionnaire replies or any other information within 40 days of the date of publication of the notice in the Official Journal. All interested parties may also apply to be heard by the Commission within the same 40 day time limit.

The Commission may decide to apply sampling. All interested parties wishing to submit any relevant information regarding the selection of the sample must make themselves known by contacting the Commission and providing the information on their company or companies as specified by the notice. Certain information relevant for the selection of the sample should reach the Commission within 15 days of the date of publication of the notice in the Official Journal and all other information must reach the Commission within a period of 21 days of the date of publication.

Parties to the investigation may wish to comment on the appropriateness of the US which is envisaged as a market economy country for the purpose of establishing normal value in respect of the People's Republic of China. These comments must reach the Commission within 10 days of the date of publication of the notice in the Official Journal. Duly substantiated claims for market economy status and/or for individual treatment must reach the Commission within 15 days of the date of publication of the notice in the Official Journal.

The investigation will be concluded within 15 months of the date of the publication of the notice in the Official Journal. Provisional measures may be imposed no later than nine months from the publication of the notice in the Official Journal.

VI. *The Week Ahead*

A. Council

- 9 October 2009: Transport, Telecom and Energy Council – Transport part (Luxembourg)

B. Parliament

- 7-8 October 2009: European Parliament plenary session (Brussels)

C. WTO

- 6-7 October 2009: Annual Meetings of the World Bank Group and the International Monetary Fund, Istanbul, Turkey
- 7-9 October 2009: WTO: Trade Policy Review Body — Chile

D. OECD

- 5-6 October 2009: Technical Barriers to Trade: Promoting Good Practices in support of Open Markets, OECD workshop and policy dialogue organised by the Trade and Agriculture Directorate.
- 6-7 October 2009: World Bank Group and IMF 2009 annual meetings. Participation of the OECD Secretary-General. Istanbul, Turkey.
- 7-8 October 2009: Patent Statistics for Policy Decision Making, conference organised by the EPO and the OECD, in co-operation with DIME Network of Excellence, EPIP, Eurostat, JPO, NSF, USPTO and WIPO. Vienna, Austria.

- 7-9 October 2009: Scaling Up Renewable Energy, Global Renewable Energy Forum co-organised by the Ministry of Energy of Mexico and the United Nations Industrial Development Organization/UNIDO. Participation of the International Energy Agency. León, Mexico.

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