

BRUSSELS MONITOR

A Weekly Review of EU Trade Policy Developments Affecting Japan

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I. WTO Watch

Russia strengthens bid for WTO membership

On 14 October 2009, Russia President Dmitry Medvedev declared that Russia is committed to joining the World Trade Organisation despite hold-ups and confusion caused by its plans to bid for membership in partnership with Kazakhstan and Belarus. He said Russia's bid to join the WTO had not been damaged by the complications of pursuing membership together with Kazakhstan and Belarus.

Russia has been negotiating to join for 16 years and is the largest economy still outside the 153-member body. Russia's negotiations with the WTO halted briefly after Vladimir Putin, the prime minister, said in June that his country would join the organisation with Kazakhstan and Belarus, countries with which it is forming a customs union. The customs union will come into force on 1 January 2010 and will create common external tariffs for the three former Soviet republics and a single market for 165 million people. The move surprised both US and EU negotiators, who had hoped that Russia's longtime bid could be completed this year. Many people, including Pascal Lamy, WTO director-general, saw the move as signalling a weakening of Russia's desire to join.

Last week Russia, Kazakhstan and Belarus said they hoped for WTO entry as soon as possible, but would pursue their candidacies as separate states. The move to enter the WTO independently of customs union partners Kazakhstan and Belarus is a rare instance in which Mr Putin has failed to prevail in an internal political disagreement. A month after Mr Putin's announcement, President Dmitry Medvedev appeared to reverse the prime minister's position, saying that a separate entry was "simpler" and "more realistic".

Igor Shuvalov, Russia's first deputy prime minister, said the three countries had formed a single working group to negotiate entry and would join the WTO simultaneously and on equal terms. Maxim Medvedkov, Russia's veteran WTO negotiator, said the three countries would continue their separate membership talks. However, they would negotiate on the basis of a common customs tariff that is due to be implemented from the beginning of next year, with the aim of joining the WTO simultaneously. Since the customs union will cover only trade in goods, there will be no harmonisation at this stage in areas such as services and intellectual property, which are also part of WTO membership negotiations.

II. European Union: Trade

EU tries to forge "green goods" duty-free pact between OECD countries and China

Businesses dealing in environmentally-friendly products or environmental goods will be interested to learn that the EU, together with the United States, is currently negotiating a pact whereby the Chinese and OECD members (including, among others, both the EU and US, as well as Japan, Australia and Canada) would eliminate tariffs on "green goods". It is hoped that such a deal, if adopted, will create a major incentive for the global trade in technologies that inhibit climate change.

According to diplomats, "this deal would save Chinese exporters billions of euros and dollars and could form a large part of the overall package offered to Beijing to cut emissions". China is about to become the world's largest producer of wind turbines and is already a major manufacturer of solar

products. As a result, the Chinese economy would largely benefit from an agreement exempting environmental products from import duties.

Businesses keen to invest in this novel market should be aware that the deal's success largely hinges on the composition of the product list. Indeed, it is very difficult to find an objective, non-discriminatory definition of what constitutes an environmental product. To be sure, such a list would include products such as solar panels, wind turbines, containers for liquid and solid waste, and refrigeration equipment.

On the other hand, extending the scope of environmental goods to include environmentally friendly consumer products, for example, would have negative implications for developing countries, especially if production processes (rather than the product's functioning) fall under scrutiny. China and others like India will certainly be careful before accepting such an option. In the same vein, observers reckon that hybrid cars will not be included in the deal.

These political disagreements put aside, businesses should be aware that the impact on the environment of many products is difficult to assess. Two products illustrate this difficulty. Chlorine, a chemical, is used for water purification and therefore can be considered to fall within the realm of environmental goods. Yet, chlorine may also pose risks to the environment. Another example is polystyrene, which is used to insulate houses and thereby save energy, but which is also used to make disposable cups, which are environmentally questionable unless they are recycled. But when the polystyrene is imported it would be impossible to identify for what purpose the polystyrene will be used.

The EU and US hope that formal negotiations with the OECD and China could kick off very soon and are exhorting China to agree on the global climate deal which will be discussed in Copenhagen this December. Businesses keen to delve deeper into the green goods arena will be particularly pleased with a determination to quickly close a deal that is seen by some trade analysts as "win-win". While trade opportunities increase (with zero tariffs), benefits to the environment can also be substantial.

III. EC Competition

European Competition Network releases report on leniency programmes

On 13 October 2009, the European Competition Network (ECN), composed of the competition authorities of the 27 EU Member States and the European Commission, published a report reviewing the state of convergence of leniency programmes of each of the ECN members with regards to the provisions of the ECN Model Leniency Programme launched in September 2006. While the report indicates that progress has been made in harmonising the Member States' leniency programmes, it is clear that there is still work to be done.

Leniency programmes prescribe the circumstances under which companies which have been engaged in competition infringements, specifically cartels, may be granted immunity or a reduction in fines as a result of cooperating with and providing evidence to competition authorities. Such programmes have long been a cornerstone of US and EU anti-cartel enforcement tools, and have been very successful in bringing to an end more than a hundred cartels in the EU alone. As a result of the success of the leniency programme at the EU level, the ECN has sought to act as a catalyst for the introduction of similar programmes at the Member State level.

While nearly all Member States now have a leniency programme of their own, the proliferation of different terms and conditions for obtaining leniency in different jurisdictions has presented a serious obstacle to the effectiveness of the programmes. Companies faced with such varied and often contradictory conditions for leniency risk leaving themselves exposed to an unacceptable level of liability if they choose to come forward with evidence of a cartel, diminishing the incentive to do so. Additionally, the fact that EU competition law is enforced in parallel by both the Commission and national enforcement authorities means that many potential leniency applicants must coordinate up to 28 different leniency applications in order to ensure that they have adequately protected themselves. Furthermore, because of the “first in the door” policy of all leniency programmes (in which the first company to provide evidence of a cartel is given a substantially higher reduction in fines than subsequent applicants), these 28 applications must all be filed in rapid succession, if not on the same day.

Thus, the ECN launched the Model Leniency Programme in 2006 to aid Member States in harmonizing their programmes around a single approach and to ensure that each national programme contained important procedural safeguards for leniency applicants. The initiative has largely been successful, with 20 Member States implementing or amending leniency programmes in line with the ECN’s model, and an additional six Member States set to do so in the near future.

Additionally, the Commission contributed to this process of harmonisation and simplification by establishing a summary application system, whereby companies which believe the Commission is particularly well placed to assume jurisdiction over a cartel investigation may file a complete application with the Commission and subsequently file copies of a summary application with Member State authorities. The ECN’s report finds that 23 Member States currently accept such summary applications, 17 of which will accept oral summary applications.

While several Member States still retain leniency programmes which make it difficult for leniency applicants to implement a single pan-EU strategy, the situation has improved substantially since 2006, and there is now more reason than ever for companies engaged in cartel activities to come forward and seek leniency.

IV. European Union: Regulatory

Compulsory reduction in personal music player sound levels in sight to protect Europe’s consumers

With up to 10 million European consumers believed to be at risk from permanent hearing damage, the European Commission has issued a mandate to CENELEC, one of the EU’s main standardisation bodies, to devise safe default settings and warnings to consumers for all personal music players. On 28 September 2009, the Commission’s consumer affairs chief Meglena Kuneva announced that a mandate had that day been delivered, to develop new technical standards for personal music players with respect to the risk of hearing loss.

Manufacturers of MP3 players and mobile phones may recall that, in October 2008, an EU Scientific Committee reported to the Commission that listening to personal music players at a high volume over a sustained period (e.g., more than 40 hours per week at high volume settings exceeding 89 dB(A) for at least five years) can lead to permanent hearing loss.

For the purposes of the Commission's mandate, personal music players are defined as battery-powered consumer electronic devices that play music through headphones or earphones and allow the user to walk around while listening. Mobile phones capable of playing music through headphones or earphones also fall within the mandate's scope.

Currently, depending on the different types of music players on the market, their safety is covered either by Directive 2001/95/EC on general product safety, Directive 1999/5/EC on radio and telecommunications equipment, or Directive 2006/95/EC on voltage limits. However, neither these Directives nor the harmonised standards adopted under them set any maximum sound limits, nor are there any requirements for any specific labelling in respect of noise emissions. The only existing requirement is that there must be a statement in the instructions manual to warn of adverse effects of exposure to an excessive sound level. The new mandate, which will lead to the adoption of a harmonised standard applicable in all the EU's Member States, provides that:

- *Safe exposure levels must be the default setting on all personal music players:* safe use depends on exposure time and volume levels. At 80dB(A), exposure should be limited to 40 hours per week, while at 89dB(A) exposure should not exceed 5 hours per week. It may come as a relief to manufacturers and consumers alike that higher exposure levels can be permitted, provided that these are intentionally selected by the user, and the product contains a reliable means of informing the user of the risks.
- *Adequate warnings must be provided:* although this is a mandated requirement, industry solutions are being sought, and could, e.g., be to provide for labels to spell out the warnings, or digital information delivered via the screen. The warnings must not only warn about the risks from hearing music at above the default settings, it must also include the situation where the original set of earphones is replaced with types that can cause higher unsafe sound levels.

Industry, represented by *DigitalEurope*, has welcomed the Commission's approach, which is to submit a mandate to CENELEC, but to refrain from dictating the technical specifications, which are instead being left to industry and other stakeholders in the framework of the CENELEC process to work out in the coming months. ANEC, the EU body representing consumer interests, would like to see in place a default sound setting of 89 dB(A), and then the need for a manual action – e.g., by means of entering a password – to gain a second maximum level of 100dB(A).

Although EU standards are not mandatory, once their reference is published in the Official Journal they become the “de facto” industry norm, and products that meet the standards benefit from a presumption of conformity, and are allowed to be placed on the market anywhere in the EU. Producers who do not comply with the standards on the other hand, must go through costly and time-consuming procedures to reach the same level of safety demanded. CENELEC is expected to deliver a harmonised standard within 24 months.

V. *EC Institutions*

Commission sees prospect of becoming “caretaker” while Czech President is pressed to sign Lisbon

On 31 October 2009, the current European Commission's five year term will come to a close. However, due to the lack of certainty over when the Lisbon Treaty will enter into force, especially given the Czech Republic's equivocation over the Treaty at this late stage, the current team of

Commissioners will have to continue in a “caretaker” capacity. Meanwhile, Commission President Barroso is continuing to pressure Czech President Vaclav Klaus to sign the Lisbon Treaty, so as to pave the way for its entry into force.

Indeed, the Commission is said to be intensifying its pressure on the Czech Republic, the only Member State among the EU-27 that has not yet executed its acceptance of the Lisbon Treaty. Should delays ensue, the Commission will have to continue, well beyond 31 October 2009, in a caretaker capacity, before the new Commission can be formed. Until the current team of Commissioners gets clarification of when exactly the Lisbon Treaty will enter into force, it will have to carry on operating in a “caretaker” capacity.

On 16 October 2009, a Commission spokesperson, Mr. Johannes Laitenberger, informed the media that “based on the principle of institutional continuity”, the Commission will automatically be extended on 1 November if at that time no new Commission is in place – which will certainly be the case.

Regarding a caretaker Commission’s powers, it will still be able – in principle at least – to put forward legislative proposals. However, the expected scenario is that such proposals will only be put forward if absolutely necessary: “It is up to it to judge whether it is necessary for a legislative proposal to be made during this period. Any legislative proposal that does not necessarily need to be presented during this period should be left to the next Commission.” As to how “necessary” is to be defined, without elaborating further, Laitenberger stated that “Each situation must be assessed on a case-by-case basis.”

There is, furthermore, no way at present to give a specific date as to when the caretaker Commission will end. The new College will be formed “once the legal basis for its formation has been clarified”. This should be interpreted as meaning: whether it would be based on the Nice Treaty, or the new Lisbon Treaty. If under Nice, at least one Commissioner will have to go, while under Lisbon, each Member State may have a Commissioner.

Barroso hopes that Czech President Klaus does not create “any artificial obstacle”, and has been for several days now been voicing his disapproval of the Czech stance. Klaus is said to be hostile to further European integration, and – according to press information – does not seem unduly shaken by the European pressure. With a caretaker Commission in place – for no one knows how long – several proposals for legislation will in all likelihood be put on hold.

VI. Dumping Watch

Notice of impending expiry of anti-dumping measures – polyester staple fibres

On 17 October 2009, the Official Journal published a notice of the impending expiry of certain anti-dumping measures. The notice concerns the expiry of anti-dumping measures on polyester staple fibres originating in the Republic of Korea.

The product concerned is synthetic staple fibres of polyesters, not carded, combed or otherwise processed for spinning, falling within CN code 5503 20 00.

It is recalled that the current measure in force is an anti-dumping duty imposed by Council Regulation 2852/2000 as last amended by Council Regulation 412/2009. The measure is due to expire on 18 March 2009.

Community producers may lodge a written request for a review at any time from the date of the publication of the present notice but no later than three months before the date of expiry. This request must contain sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury. Should the Commission decide to review the measures concerned, importers, exporters, representatives of the exporting country and Community producers will then be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request.

Notice of impending expiry of anti-dumping measures – polyester staple fibres

On 17 October 2009, the Official Journal published a notice of the impending expiry of certain anti-dumping measures. The notice concerns the expiry of anti-dumping measures on polyester staple fibres originating in the People's Republic of China and Saudi Arabia.

The product concerned is synthetic staple fibres of polyesters, not carded, combed or otherwise processed for spinning, falling within CN code 5503 20 00.

It is recalled that the current measure in force is an anti-dumping duty imposed by Council Regulation 428/2005, as last amended by Council Regulation 412/2009. The measure is due to expire on 18 March 2009.

Community producers may lodge a written request for a review at any time from the date of the publication of the present notice but no later than three months before the date of expiry. This request must contain sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury. Should the Commission decide to review the measures concerned, importers, exporters, representatives of the exporting country and Community producers will then be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request.

Notice of impending expiry of anti-dumping measures – compressors

On 22 October 2009, the Official Journal published a notice of the impending expiry of certain anti-dumping measures. The notice concerns the expiry of anti-dumping measures on compressors originating in the People's Republic of China.

The product concerned is reciprocating compressors (excluding reciprocating compressor pumps), giving a flow not exceeding 2 cubic metres (m³) per minute, falling within CN codes ex 8414 40 10, ex 8414 80 22, ex 8414 80 28 and ex 8414 80 51, (TARIC codes 8414 40 10 10, 8414 80 22 19, 8414 80 22 99, 8414 80 28 11, 8414 80 28 91, 8414 80 51 19 and 8414 80 51 99) and originating in the People's Republic of China.

It is recalled that the current measure in force is an anti-dumping duty imposed by Council Regulation 261/2008. The measure is due to expire on 21 March 2010.

Community producers may lodge a written request for a review at any time from the date of the publication of the present notice but no later than three months before the date of expiry. This request must contain sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury. Should the Commission decide to review the measures concerned, importers, exporters, representatives of the exporting country and Community producers will then be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request.

Amendment of anti-dumping duty – ammonium nitrate

On 23 October 2009, the Official Journal published Council Regulation 989/2009 amending Regulation 661/2008, imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia.

The product concerned is ammonium nitrate falling within CN codes 3102 30 90 and 3102 40 90 and originating in Russia. Based on a request from the Community industry a product scope interim review was subsequently carried out and, by Council Regulation (EC) No 945/2005, definitive anti-dumping duties were imposed on imports of solid fertilizers with an ammonium nitrate content exceeding 80% by weight (AN), currently falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 91 and originating in Russia.

It is recalled that by Regulation 658/2002, the Council imposed a definitive anti-dumping duty on imports of ammonium nitrate falling within CN codes 3102 30 90 and 3102 40 90 and originating in Russia. Based on a request from the Community industry a product scope interim review was subsequently carried out and, by Council Regulation (EC) No 945/2005, definitive anti-dumping duties were imposed on imports of solid fertilisers with an ammonium nitrate content exceeding 80% by weight (AN), currently falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 91 and originating in Russia. Following a request for an expiry review, the Council, by Regulation 661/2008, confirmed the anti-dumping duties on imports of ammonium nitrate originating in Russia.

By judgment of 10 September 2008 in Case T-348/05, as interpreted by judgment of 9 July 2009 in Case T- 348/05 INTP, the Court of First Instance of the European Communities annulled Council Regulation 945/2005 in so far as it concerned JSC Kirovo- Chepetsky Khimichesky Kombinat.

In view of the above findings, the Council concluded that anti-dumping measures applicable to imports originating in Russia of ammonium nitrate, other than those falling within CN codes 3102 30 90 and 3102 40 90, manufactured and exported by JSC Kirovo-Chepetsky Khimichesky Kombinat should be repealed with retroactive effect to the date of entry into force of Council Regulation 661/2008.

The rate of definitive anti-dumping duty for goods produced by JSC Kirovo-Chepetsky Khimichesky Kombinat falling within CN codes 3102 30 90 and 3102 40 90 is €47.07 per tonne. For the product concerned produced by JSC Kirovo-Chepetsky Khimichesky Kombinat and falling within other CN codes no anti-dumping duty applies.

Council Regulation 989/2009 entered into force on 24 October 2009.

VII. The Week Ahead

A. Council

- 26-27 October 2009: General Affairs and External Relations Council (Brussels)
- 29-30 October 2009: European Council (Brussels)

B. WTO

- 26-28 October 2009: WTO: Trade Policy Review Body — Maldives

C. OECD

- 26-29 October 2009: Opening address by the Secretary-General at the International Tax Dialogue (ITD) conference on “Financial Institutions and Instruments – Tax Challenges and Solutions” hosted by the Chinese Ministry of Finance. Beijing, People’s Republic of China.
- 27-30 October 2009: Charting Progress, Building Visions, Improving Life: OECD World Forum on Statistics, Knowledge and Policy, organised by the OECD Statistics Directorate and the government of Korea. Participation of the Secretary-General. Busan, Korea.
- 28-30 October 2009: Safety of Manufactured Nanomaterials working group meeting, organised by the Environment Directorate.

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