

BRUSSELS MONITOR

A Weekly Review of EU Trade Policy Developments Affecting Japan

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I. WTO Watch

WTO Director-General calls for “global governance” to meet global challenges

Speaking in Milan on 9 November 2009, on the occasion of the 20th anniversary of the fall of the Berlin Wall, WTO Director-General Pascal Lamy commented on the necessity of the “right global governance” to meet global challenges.

Lamy commented on the lack of global preparedness for the challenges arising at the end of the Cold War. “It was the end of a bi-polar world”, he said. “A new world order was being born. And yet there was not enough thinking and discussion about its governance structures. There was never a Bretton Woods Conference or a San Francisco Conference post 1989.” According to Lamy, this is the root of many of today’s problems since global governance structures did not adjust and global governance remains too weak.

Lamy stressed the importance of the rule of law and of enforceable commitments in the new global order. He indicated that he sees commitments anchored in a multilateral context, and subject to monitoring and dispute settlement, as more efficient and coherent. He underlined the principle of subsidiarity of the international system, which should not be overburdened with issues which are better dealt with at the local, regional or national level.

Lamy also commented that the coherence of the international system lies first and foremost with the members of international organisations. “We can and must have the ‘UN Delivering as One’, but we also have to see the “UN Members behaving as One” in the different organisations which make up the family of the United Nations”, he said. Lamy also suggested that the legitimacy of the global system would be greatly enhanced if international issues become part of the domestic political debate.

Lamy expressed some optimism by saying that the global economic crisis has accelerated the move towards a new architecture of global governance, in what he called a “triangle of coherence”. This consists of the following: G20, which provides political leadership and policy direction; member-driven international organisations providing expertise and specialised inputs; and the UN, which provides a forum for accountability. In the longer term, Lamy called upon G20 and international agencies to become more accountable to the “parliament” of the UN. A revamping of the UN Economic and Social Council should, according to Lamy, provide a potent mix of leadership, inclusiveness and action that would ensure coherent and effective global governance.

II. European Union: Trade

EU study finds majority of cross-border online retail purchases face obstacles

Businesses selling their consumer goods in the EU may be concerned about the findings of a recent European Commission Communication, which reports that EU consumers who wish to purchase goods such as CDs, cameras, computers, washing machines, clothing and books from online retailers based in another EU Member State face serious difficulties.

The Communication, published on 22 October 2009, revealed the results of a study where shoppers across the EU tried to purchase a list of 100 popular products from a cross-border provider online. The study found that over 60% of these cross-border transactions could not be completed, primarily because the online retailer did not ship the product to the consumer’s Member State, or because the

online retailer did not offer adequate means for cross-border online payment. The fact that over 60% of cross-border transactions cannot be completed reveals a serious loss of business potential for online retailers; a fact which will not be lost on overseas e-retailers selling consumer goods to the EU's consumers.

In 2008, 41% of online consumers purchased clothes and sporting goods, and 25% bought electronic goods (including cameras). These percentages could, in principle, increase, given that over one-third of EU consumers stated that they would consider shopping online from another EU country if the products were cheaper or better. Indeed, in 13 out of 27 Member States, for at least half of all product searches, consumers were able to find an offer that was at least 10% cheaper in another Member State.

The fact that cross-border online retailing has not yet reached its full potential in the EU market is also evident when one considers that though the share of EU consumers who shop online grew from 27% to 33% in only two years (between 2006 and 2008), the share of EU consumers who shop online across EU Member State borders did not change in the same two year period. Yet the number of retailers who offer products online is growing: in 2008, 51% of EU retailers sold online.

The Communication listed Austrian and Spanish retailers as the most receptive to orders from other EU Member States. Consumers in Belgium, Latvia, Romania and Bulgaria were the least likely to be able to purchase goods online.

In order to encourage cross-border online retail sales, the Communication has listed a number of strategies that are meant to improve the two largest obstacles in online cross-border retailing: the lack of consumer confidence in purchasing goods from other Member States via the internet, and the discouraging effect of complex legal obligations for retailers who are based in one Member State but wish to sell in another. Three key strategies are discussed below.

Firstly, would be the bid to simplify certain EU rules because, currently, businesses have few incentives to sell goods across borders through online channels. VAT reporting obligations have to be made simpler; the burden for businesses related to recycling obligations have to be reduced; and a manageable system on the collection of copyright levies should be established. Without such changes, the Commission believes that the business environment for online retailers is complex, costly and unpredictable.

Secondly, another strategy listed in the Communication is aimed at increasing consumer trust in cross-border shopping. Therefore, the Commission proposes that coordinated EU-led action to not only correctly implement but actually *enforce* consumer law should continue.

Finally, a single new "Consumer Rights Directive" would replace different EU directives concerning unfair contract terms, sales and guarantees, distance-selling and doorstep-selling, in such a way that compliance costs for retailers can be reduced. Currently, cross-border online retailers are subject to at least two different legal regimes: the legal regime where the retailer is based and the legal regime where the consumer is located. This leads to legal uncertainty as to the rights and obligations of the retailer, because each consumer directive is implemented differently (even though it should not be) in the Member States.

It is hoped that a single new Directive on consumer rights, proposed by the Commission in October 2008 but still undergoing the lumbering EU legislative machinery, will reduce legal complexities

related to having different directives, such that retailers are afforded legal clarity when they wish to sell products online to consumers located elsewhere in the EU.

To read the Commission report on cross-border consumer e-commerce, businesses should access the following web link: http://ec.europa.eu/consumers/strategy/docs/COM_2009_0557_4_en.pdf.

III. EC Competition

Commission issues Statement of Objections in Oracle/Sun acquisition

On 9 November 2009, the European Commission issued a formal Statement of Objections (“SO”) to Oracle regarding its proposed acquisition of rival software company Sun Microsystems.

It will be recalled that, earlier this year, Oracle notified the Commission of the proposed acquisition in order to obtain merger control approval. Similar notifications were submitted to other antitrust authorities around the world, including the US, and all such authorities have given Oracle permission to proceed. Nonetheless, the Commission has determined, after a preliminary investigation, that it is possible that the acquisition might lead to competition problems in the markets for, among others, databases and middleware. As a result, on 3 September 2009, the Commission opened a second phase investigation into the merger, which means that the Commission now has until 19 January 2010 to either approve the merger, with or without conditions, or prohibit it. In sending Oracle an SO, it appears that the Commission may be leaning towards either a prohibition decision, or an approval decision with conditions intended to cure its competition law concerns.

The SO sets out the Commission’s preliminary assessment of the competition effects of the acquisition, and is reportedly limited to the potentially negative effects of the combination of Sun’s open-source MySQL database product and Oracle’s proprietary enterprise database products. Oracle has responded to the SO by saying that it reveals a profound misunderstanding of both database competition and open-source dynamics. Oracle contends that, because MySQL is open-source, it cannot be controlled by any entity, and will thus continue to represent an independent choice for consumers and exert a competitive force on Oracle’s products after the transaction. This is, for all intents and purposes, the same conclusion that the US Department of Justice reached in approving the deal in August. The US authorities have even taken the unusual step of issuing a press release to respond to the SO, re-iterating its findings that the deal would not cause any competition problems in the database market.

While an SO is only a preparatory document and does not prejudice the Commission’s final stance on the legality of the proposed acquisition, the issuance of an SO generally implies that the Commission has serious concerns and is unlikely to approve the deal without concessions offered by the merging parties. In this case, it is difficult to see exactly what shape these conditions might take, although it is possible that Oracle might agree to adhere to certain licensing conditions with respect to the database products, or even to keep its proprietary database products business functionally separate from its open-source database products unit.

IV. European Union: Regulatory

Two REACH deadlines imminent: one for first-time imports, the other for downstream users

Businesses should be alerted to an impending deadline, 30 November 2009, for certain imports of chemicals, preparations and chemical-containing articles entering the EU. The REACH Regulation requires that for any such imports to continue smoothly and freely into the EU, importers (or so-called Only Representatives of manufacturer-exporters outside the EU) had to pre-register the chemical substances being imported by a now-long-passed deadline (1 December 2008). The only allowed exception to this has been that of “first-time” manufacturers or importers.

Despite the complex intricacies of the REACH Regulation, it is well-known by now that pre-registration is the process via which a potential registrant of a phase-in substance submits certain minimal required information to the European Chemicals Agency (ECHA), which consequently allows the entity to benefit from the transitional regime before full-fledged registration. The pre-registration period ended on 1 December 2008. However, potential registrants who manufacture or import, for the first time, a phase-in substance in quantities of one tonne or more per year after 1 December 2008, can submit a late pre-registration, provided they do so:

- at the latest 6 months after manufacturing or importing a substance above the 1 tonne threshold per year; and
- at least 12 months before the relevant transitional deadline for registration.

Businesses may know that late pre-registration does not apply to companies that should have, but failed to, meet the pre-registration deadline. These companies cannot continue producing or importing the substance until they have submitted a full registration dossier for the relevant tonnage. First time pre-registrants will need to pre-register any substance one at a time with the online pre-registration functionality. Late pre-registrations can only be submitted via the REACH-IT portal. As a late pre-registrant, an entity must sign up in REACH-IT to create an account and be able to submit their dossier (details can be obtained from the ECHA website, see link below).

The final deadline for late pre-registration is 30 November 2009 for potential registrants who need to register their phase-in substances by 30 November 2010. A phase-in substance needs to be registered by 30 November 2010 if it is:

- manufactured in or imported into the EU in quantities of 1,000 tonnes or more per year;
- classified as carcinogenic, mutagenic or toxic to reproduction (category 1 or 2) and manufactured in or imported into the EU, in quantities of 1 tonne or more per year;
- classified as very toxic to aquatic organisms which may cause long-term adverse effects in the aquatic environment (R50/53) and manufactured in or imported into the EU in quantities reaching 100 tonnes or more per year.

For further information on first time imports, businesses should access the following link: http://echa.europa.eu/reachit/pre-registration-it_en.asp.

The date of 30 November 2009 is a deadline for another activity under REACH. It applies to Downstream Users (DUs) in the Community, of chemical substances, who need to inform their suppliers (e.g., EU importers) of the use they make of the substance. The deadline of 30 November 2009 applies only if the substance needs to be registered before 1 December 2010 (which would be the case in the three bullet-pointed situations described above).

As a user of chemicals, the DU should inform its suppliers about its use of a substance if it wants the supplier to lay down the use in relation to the registration of the substance concerned. The advantage

of communicating its use in time to the supplier is that the DU's conditions of use are then normally covered by the supplier's Exposure Scenario. The registrant of the substance will have to take account of the use in preparing the Chemical Safety Assessment. The DU can then expect its use to be an identified use and have an Exposure Scenario covering its conditions of use, unless the registrant cannot support the use. If the registrant cannot support the DU's use for reasons of protection of human health or the environment, both the DU and ECHA need to be notified.

Businesses having DUs in the EU should note that if they do not communicate their use, and it is not covered by their supplier's Exposure Scenarios, they will eventually need to prepare a Chemical Safety Assessment themselves, once the substance has been registered. This can be extremely burdensome, time-consuming and costly. The DU is thus advised to provide its information in writing to its supplier on both the use and the conditions under which the substance is used.

For more information on DUs and the information to be provided to suppliers, businesses may like to access the following:

REACH Guidance for Downstream Users (chapters 4, 6, 7 and 8):

http://guidance.echa.europa.eu/docs/guidance_document/du_en.htm?time=1254330774

Guidance on information requirements and chemical safety assessment Chapter R.12: Use descriptor system:

http://guidance.echa.europa.eu/docs/guidance_document/information_requirements_r12_en.pdf

REACH Fact Sheet - Downstream Users – How To Make Uses Known to Suppliers:

http://echa.europa.eu/doc/reach/reach_factsheet_du_en.pdf

V. *Dumping Watch*

Initiation of expiry review and partial interim review – okoumé plywood

On 11 November 2009, the Official Journal published a notice of initiation of an expiry review and a partial interim review of the anti-dumping measures applicable to imports of okoumé plywood originating in the People's Republic of China.

The product under review is okoumé plywood, defined as plywood consisting solely of sheets of wood, each ply not exceeding 6 mm thickness, with at least one outer ply of okoumé not coated by a permanent film of other materials, currently falling within CN code ex 4412 31 10.

It may be recalled that the measures currently in force are a definitive anti-dumping duty imposed by Council Regulation 1942/2000.

The request for the expiry review was lodged on 13 August 2009 by the European Federation of the Plywood Industry (the applicant) on behalf of producers representing a major proportion, in this case more than 40%, of Community production of okoumé plywood. The request was based on the grounds that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and recurrence of injury to the Community industry.

It was noted that a number of French producers of okoumé plywood are subject to French court proceedings concerning allegations of anti-competitive behaviour. It could not be excluded that this may have distorted the injury assessment in the original investigation. Therefore, the Commission has

initiated *ex officio* an interim review to re-examine the injury situation of the Community industry, in particular in comparison to the situation which prevailed in the period of the original investigation.

All interested parties who did not cooperate in the investigation leading to the measures subject to the present review should request a questionnaire as soon as possible, but not later than 15 days after the publication of the notice. 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.

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

VI. *The Week Ahead*

A. Council

- 16-17 November 2009: General Affairs and External Relations Council – including defence and development ministers (Brussels)
- 19 November 2009: Ecofin Council – Budget (Brussels)
- 19-20 November 2009: Agriculture and Fisheries Council (Brussels)

B. WTO

- 16-20 November 2009: New course on “International Trade and Labour Markets” ITC-ILO Campus, Turin
- 17 November 2009: WTO General Council

C. OECD

- 14-18 November 2009: OECD events at the Internet Governance Forum (IGF) organised by the Directorate for Science, Technology and Industry in co-operation with the Information Technology Industry Development Agency (ITIDA) of Egypt, and under the auspices of the Egyptian Ministry of Communications and Information Technology. Sharm El Sheikh, Egypt.
- 16-17 November 2009: Good governance at local and regional level in turbulent times: the challenge of change, ministerial conference organised by the Netherlands government and the

Council of Europe, with participation of OECD Deputy Secretary-General Aart de Geus. Utrecht, the Netherlands.

- 16-18 November 2009: International Trade in Goods and Trade in Services Statistics, working party meeting.
- 16-18 November 2009: FAO World Summit on Food Security, organised by the Food and Agriculture Organization, with participation of the OECD. Rome, Italy.
- 16-18 November 2009: The Future for Inter-Urban Passenger Transport: Bringing Citizens Closer Together, symposium on transport, economics and policy, organised by the Joint Transport Research Centre of the OECD and the International Transport Forum. Madrid, Spain.
- 16-18 November 2009: High-level Consortium meeting of the PARIS21 partnership, organised jointly by OECD and the government of Senegal. Followed by the African Symposium on Statistical Development. Dakar, Senegal.
- 16-18 November 2009: World Innovation Summit for Education (WISE), organised by the Qatar Foundation, with participation of the OECD. Doha, Qatar.
- 17 November 2009: OECD Ateliers media briefing, on invitation and in French, to present OECD's work on financial education issues, presented by André Laboul, head of the financial affairs division. Organised by the OECD and the AJEF as part of a monthly series.
- 17-18 November 2009: The Korean G-20 Leadership: Assessing the Key Issues for 2010, seminar with participation of the Secretary-General. Seoul, Korea.
- 18 November 2009: Social Inclusion conference organised by the OECD LEED Programme. Trento, Italy.
- 18-20 November 2009: Ministerial eGovernment conference: Teaming Up for the eUnion, with participation of Deputy Secretary-General Aart de Geus. Malmö, Sweden.
- 19 November 2009: Publication of OECD Economic Outlook No. 86. News conferences.
- 19-20 November 2009: Ministerial conference on Road Safety, hosted by the Russian authorities. Participation of the OECD and International Transport Forum. Moscow, Russian Federation.
- 22-23 November 2009: Business Forum and Women Business Leaders Summit, and Governance Forum on 22/11, open to the media, followed by ministerial conference of Middle East North Africa (MENA) regions on 23/11 with news conference at 9h45. Organised by the MENA-OECD Initiative, with participation of the Secretary-General. Marrakech, Morocco.

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