

BRUSSELS MONITOR

A Weekly Review of EU Trade Policy Developments Affecting Japan

18 December 2009

IN THIS ISSUE

- I. *WTO Watch*
EU requests WTO panel over Philippines' taxation of imported distilled spirits
- II. *European Union: Trade*
Ratification of EU-Korea Free Trade Agreement could be delayed due to internal politics in South Korea
- III. *EC Competition*
Standards-setting comes to the fore
- IV. *European Union: Regulatory*
EU investigates implementation of Batteries Directive
- V. *Dumping Watch*
 - A. Provisional anti-dumping duty – cargo scanning systems
 - B. Initiation of anti-dumping proceedings – continuous filament glass fibre products
 - C. Provisional anti-dumping duty – molybdenum wires
 - D. Repayment of anti-dumping duty and partial reopening of anti-dumping proceedings - ironing boards
- VI. *The Week Ahead*
 - A. Council

Brussels Monitor is a product of the Japan Fair Trade Center in cooperation with the international trade practice of the Belgium law firm of Van Bael & Bellis. All questions concerning its content should be addressed to:

*Van Bael & Bellis
Avenue Louise 165
B-1050 Brussels, Belgium
TEL: 32-2-647-7350
FAX: 32-2-640-6499
E-MAIL: vbb@vanbaelbellis.be*

I. WTO Watch

EU requests WTO panel over Philippines' taxation of imported distilled spirits

On 11 December 2009, the EU requested the establishment of the WTO dispute-settlement panel to rule on the EU's complaint that the Philippines' tax regime on distilled spirits is discriminatory and infringes international trade rules.

In fact, the Philippines' excise tax legislation has been criticised by the European industry since the adoption of its 1996 Republic Act N° 8240, which placed a lower flat rate of excise tax on certain alcoholic drinks "where produced commercially in the country where they were processed into distilled spirits". It is important to note that the raw materials in question (notably, sap of palms or the juice, sugar or syrup of cane) are generally used domestically in the Philippines. Other, mostly imported, spirits became subject to substantially higher taxes.

Concerns grew more serious when, in 2004, the Philippines adopted legislation increasing excise tax by 50% for most types of imported alcoholic products and but by only 30% for locally-produced spirits. Correspondingly, sales of local spirits have grown by 8% since 2005, whilst the EU export of spirits to the Philippines fell from around €37 million to €18 million during 2004 to 2007. EU spirits sold in the Philippines are mainly Spanish brandy and Scotch whisky.

As a result, in July 2008, the EU has requested WTO consultations, which were subsequently held in Manila in October 2009. The parties, however, failed to settle the case amicably. As a result, the European Trade Commissioner Benita Ferrero-Waldner stated that "the EU has no other options [but to request] a WTO panel to rule on this issue".

Manuel A. J. Teehankee, the Philippines' permanent representative to the WTO, expressed his regret that "the EU has taken this step despite the continued constructive engagement of the Philippines and explanations provided about the historical context and non-discriminatory structure of the legal measures subject of the EU complaint". Moreover, he declared that "the Philippines will assert all its legal rights and oppose the EU request for the establishment of a panel". In fact, WTO rules allow any defendant to block or refuse the establishment of a panel when a complainant files its request for the first time. Nevertheless, if the EU files a second request for the creation of a WTO panel, the panel will be formed notwithstanding the Philippines' disagreement. Commissioner Ferrero-Waldner mentioned, however, that the EU "still hopes the Philippine Government would remedy the situation without waiting for the completion of WTO dispute settlement procedures".

Finally, it should be noted that, in 2008, the EU was the largest source of foreign direct investment in the Philippines and the top market destination for Philippines' goods. Indeed, around 18% of Philippines' exports entered the EU under the Generalised System of Preferences and another 70% benefited from duty-free treatment on a most-favoured nation basis.

II. European Union: Trade

Ratification of EU-Korea Free Trade Agreement could be delayed due to internal politics in South Korea

According to news reports, South Korea intends to delay its ratification of the EU-Korea Free Trade Agreement ("FTA"). Such a move could jeopardise the entry into force of the agreement until beyond 2010. Along with this new twist, questions still remain over the EU's own ratification process of the deal.

The EU and South Korea had previously intended for the FTA to enter into force at some point during the second half of 2010 at the latest. The text has already been translated into all of the EU's official languages,

and is awaiting presentation to the Council by the new European Commission, which is hoped to occur in February 2010.

However, it appears that the South Korean Government is considering postponing the submission of the FTA to its National Assembly until after the local and regional elections, which are planned for June 2010. In doing so, the South Korean Government hopes that it can bypass internal opposition to the trade deal, which would weaken the Grand National Party of President Lee Myung-bak before the vote. FTAs remain a sensitive domestic issue in South Korea, where the agricultural sector is vehemently opposed to trade liberalisation.

If ratification is pushed back beyond Spring 2010, this means that the FTA will likely not be implemented within the timeframe previously expected. On the other hand, it is likely that a swift ratification by the Korean side could occur quickly after the elections, as opposition representatives have apparently informed EU officials that they would not veto the FTA despite concerns over several issues, not least the agriculture one. Indeed, according to South Korean chief negotiator Lee Hye-min, the FTA will now be implemented “by the end of 2010”.

Nonetheless, some companies are not so optimistic about even a 2010 year-end ratification. One EU Member State chamber of commerce officer reportedly stated that “the Koreans are now looking at early 2011 for the implementation of the FTA”. Given that the Korea-US FTA has still not been ratified, despite being signed in 2007, it is questionable whether one can hope for more in terms of a quicker timeframe for the EU-Korea FTA. This is a question that the Commission does not wish to have to broach, as it would not be happy with any further delays in the ratification procedure.

For its part, the new Commission will likely present the FTA to the Council for formal signature in February 2010 at the earliest. A ceremony is expected for March, but the location is still to be decided. In the meantime, the European Parliament will begin debating on the text, a process which is likely to lead to tough and controversial discussions. Question marks still remain over the influence that Members of Parliament will have under the rules of the Lisbon Treaty. It is also still unclear at this stage whether national parliaments in all 27 Member States will have any say. These issues, together with South Korea’s latest plan to delay the process, could all end up delaying final ratification until beyond 2010.

III. EC Competition

Standards-setting comes to the fore

The month of December 2009 was a busy one with regards to the issue of standards-setting in the context of competition law, and it appears likely that this will continue to be an important issue under the next Commission, set to take office in early 2010. In the area of information technology in particular, the establishment of a standard by a standards-setting organisation can have numerous positive effects, from ensuring interoperability of devices to facilitating the sharing of new technology to promote innovation. However, as has been seen in several cases, standards-setting can also give rise to potential anti-competitive agreements and abuses of dominance.

Per Hellström, a Commission official well-versed in issues of technology licensing and standards-setting through his role as the head of the DG COMP unit dealing with information industries, the internet, and consumer electronics, has continued to speak-up about the need to address such problems. Readers may recall that, in September 2009, Mr Hellström made news by seemingly endorsing the use of so-called “*ex-ante*” licensing regimes, which could help prevent some of potential anti-competitive facets of standards-setting.

Mr Hellström has now brought the issue up a second time. Speaking during a conference held in Brussels on 3 December 2009, Mr Hellström confirmed that the role of standards was likely to gain prominence in the next European Commission. Mr Hellström warned that, in some cases, standards could confer market power and constitute an abuse, but that such problems should be solved by implementing a minimum set of rules,

including openness, non-discrimination and transparency. Mr Hellström also said that some clarity might be needed on how to tackle companies that refuse to disclose their patent rights until after they have been included in a standard (so-called “patent ambush”), or that do not respect principles of fair, reasonable and non-discriminatory (“FRAND”) licensing terms for patent use. Finally, Mr Hellström sought to clarify his earlier statement on *ex ante* pricing for standards, stating that “[s]ome misunderstand the Commission as wanting to impose *ex ante* rules for standard setting. We can advise on what is problematic, but the market knows what works.”

In light of the key points made during Hellström’s speech, it came as no surprise when, on 10 December 2009, the European Commission welcomed the declaration made by IPCom that, following its acquisition of the mobile telephony portfolio of Robert Bosch GmbH (“Bosch”), it had agreed to take over Bosch’s previous commitment to grant irrevocable patent licences on FRAND terms. Bosch’s portfolio included patents essential to the standards of the European Telecommunications Standard Institute (“ETSI”) and the Universal Mobile Telecommunications System (“UMTS”). As a member of ETSI, Bosch took part in the GSM and UMTS standard setting processes. Bosch had declared that it held essential patents in the relevant standards and committed to ETSI to grant irrevocable licenses on FRAND terms.

In contrast to Bosch, which declared its ownership of essential patents in the relevant standards, US chip manufacturer Rambus had previously found itself in trouble with the European Commission for allegedly failing to disclose its ownership of patents during the standards-setting process. In 2007, the Commission sent a Statement of Objections to Rambus, provisionally concluding it was abusing its dominant position by claiming unreasonable royalties for the use of its patents.

However, the European Commission announced on 9 December 2009 that it has adopted a decision accepting commitments offered by Rambus to cure the Commission’s concerns. Essentially, Rambus has committed to putting a worldwide cap on its royalty rates for products compliant with certain random access memory (“RAM”) standards for five years. As part of the overall package, Rambus has agreed to charge zero royalties for certain previously adopted RAM standards while substantially lowering its royalty rate for other standards. This decision by the Commission brings its investigation to a close. As part of the settlement, the Commission makes no finding of liability, and no fine will be assessed against Rambus.

IV. European Union: Regulatory

EU investigates implementation of Batteries Directive

On 27 November 2009, a Commission Decision establishing a questionnaire concerning implementation in the Member States of the Batteries Directive, 2006/66/EC, was published in the Official Journal of the EU. Businesses who import batteries or battery-using products into the EU should take note of this development, as the responses to this questionnaire will inform the Commission as to whether the measures which are currently in place are effective, and will likely contribute to future policy decisions in this area.

Member States have been asked to provide information on the following points, amongst others:

- information on the transposition of the Batteries Directive into national law;
- the steps which have been taken to increase the environmental performance of batteries and accumulators;
- the collection targets for batteries and accumulators and whether these have been met;
- treatment and recycling measures which have been put in place;
- financing agreements and the measures which have been taken to ensure that the collection, treatment and recycling of all waste batteries and accumulators is financed by producers or third parties acting on their behalf, as well as the measures taken to ensure that producers are not being double-charged where alternative collection schemes are already in place; and
- inspections and enforcement, including how many cases of non-compliance have been established and whether any non-compliant products have been removed from the national market.

As businesses may be aware, the Batteries Directive was scheduled to be implemented in all Member States by 26 September 2008. The obligations set out under the Directive apply to all types of batteries, whether these are intended for consumer goods, industrial use or vehicles. The Directive prohibited the following, as from 26 September 2008:

- all batteries and accumulators, whether or not incorporated in appliances, containing more than 0.0005% of mercury by weight (except for button cells, which must have a mercury content of no more than 2% by weight); and
- portable batteries and accumulators, including those incorporated in appliances, with a cadmium content by weight of more than 0.002% (except for portable batteries and accumulators for use in emergency and alarm systems including emergency lighting, medical equipment, or cordless power tools).

To ensure that a high proportion of spent batteries and accumulators are recycled, Member States must take whatever measures are needed (including economic instruments) to promote and maximise separate waste collections and prevent batteries and accumulators from being discarded as unsorted waste. Member States are also required to make arrangements enabling end-users to discard spent batteries and accumulators at collection points in their vicinity and have them taken back at no charge by the producers. Collection rates of at least 25% and 45% have to be reached by 26 September 2012 and 26 September 2016 respectively.

Manufacturers also have to meet the Directive's labelling requirements, including for batteries that are incorporated or embedded in appliances, if they wish to sell their products in the EU:

- the symbol of a crossed-out wheeled bin, for all batteries;
- the chemical symbol for the metal concerned – Hg, Cd or Pb – for batteries, accumulators and button cells containing more than 0.0005 % mercury, more than 0.002 % cadmium or more than 0.004 % lead;
- the capacity of all portable and automotive batteries and accumulators.

The Batteries Directive furthermore lays down recycling requirements for spent batteries. Importers of batteries and appliances containing them will also know that they are obliged to register in each EU Member State where they place batteries on the market. A producer is any person who supplies or makes available to a third party batteries or accumulators (including those incorporated in appliances or vehicles) within the territory of that Member State, for the first time on a professional basis.

The Batteries Directive sets minimum rules for the functioning of national battery collection and recycling schemes, in particular with respect to the financing of these schemes by producers. Fortunately, Member States have to ensure that any financing requirement for collection, treatment and recycling avoids double charging of producers who are already liable for financing under the EU's WEEE Directive and end-of-life vehicles Directive.

A copy of the Batteries Directive can be found at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:266:0001:0014:EN:PDF>.

A copy of the questionnaire on the implementation of the Batteries Directive can be found at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:312:0056:0058:EN:PDF>.

V. *Dumping Watch*

A. **Provisional anti-dumping duty – cargo scanning systems**

On 17 December 2009, the Official Journal published Commission Regulation 1242/2009 imposing a provisional anti-dumping duty on imports of certain cargo scanning systems originating in the People's Republic of China.

The products concerned are systems for scanning of cargo, based on the use of neutron technology or based on the use of X-rays with an X-ray source of 250 KeV or more or based on the use of alpha, beta or gamma radiations, currently falling within CN codes ex 9022 19 00, ex 9022 29 00, ex 9027 80 17 and ex 9030 10 00 and motor vehicles equipped with such systems currently falling within CN code ex 8705 90 90 originating in the People's Republic of China.

It is recalled that the anti-dumping investigation was initiated on 18 March 2009, as a result of a complaint lodged on 2 February 2009 by the Community producer Smiths Detection Group Limited (the "complainant"), representing a major proportion, in this case more than 80%, of the total Community production of certain cargo scanning systems.

On the basis of the investigation, it is provisionally confirmed that the material injury to the Community industry, which is characterized by a decrease in EU sales and market share in the Community market as well as negative financial results, was caused by the dumped imports of the product concerned from the People's Republic of China. Therefore, it was considered that provisional anti-dumping duties should be imposed.

The rate of the provisional anti-dumping duty applicable to the net, free-at-Community-frontier price, before duty, of the products concerned shall be 36.6%.

Regulation 1242/2009 entered into force on 18 December 2009. It will apply for six months.

B. Initiation of anti-dumping proceedings – continuous filament glass fibre products

On 17 December 2009, the Official Journal published a notice of initiation of an anti-dumping proceeding concerning imports of certain continuous filament glass fibre products originating in the People's Republic of China.

The products under investigation are chopped glass fibre strands, of a length of not more than 50 mm; glass fibre rovings; slivers and yarns of glass fibre filaments; and mats made of glass fibre filaments excluding mats of glass wool, originating in People's Republic of China, currently falling within CN codes 7019 11 00, 7019 12 00, 7019 19 10 and ex 7019 31 00.

The complaint was lodged on 3 November 2009 by the European Glass Fibre Producers Association (the "complainant") on behalf of producers representing a major proportion, in this case more than 50%, of the total Community production of certain continuous filament glass fibre products. The complainant has provided evidence that imports of the product under investigation from the People's Republic of China have increased overall in absolute terms and have increased in terms of market share. The prima facie evidence provided by the complainant shows that the volume and the prices of the imported product under investigation have, among other consequences, had a negative impact on the quantities sold, the level of prices charged and the market share held by the Community industry, resulting in substantial adverse effects on the overall performance, the financial situation and the employment situation of the Community industry.

All interested parties are invited to make their views known, submit information and provide supporting evidence. Unless otherwise specified, this information and supporting evidence should reach the Commission within 37 days of the date of publication of the notice in the Official Journal. Community producers, importers and their representative associations, representative users and representative consumer organisations, that will make themselves known within 15 days of the date of publication of the notice in the Official Journal, may provide the Commission with information on whether the imposition of measures is in the Community interest within 37 days of the date of publication of the notice in the Official Journal, unless otherwise specified. Parties to the investigation may wish to comment on the appropriateness of Turkey, 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 must reach the Commission within 15 days of the date of the notification of the sample selection or of the decision not to select a sample, unless otherwise specified. All interested parties may request to be heard by the Commission. For hearings on issues pertaining to the initial stage of the investigation the request must be submitted within 15 days of the date of publication of the notice in the Official Journal. Thereafter, a request to be heard should be submitted within the specific deadlines set by the Commission in its communication with the parties.

In view of the apparent large number of parties involved in this proceeding, the Commission may decide to apply sampling. All interested parties are requested to make themselves known to the Commission within 15 days of the date of publication of the notice in the Official Journal, unless otherwise specified. All interested parties wishing to submit any other relevant information regarding the selection of the sample must do so within 21 days of the publication of the notice in the Official Journal, unless otherwise specified.

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 9 months from the publication of the notice in the Official Journal.

C. Provisional anti-dumping duty – molybdenum wires

On 18 December 2009, the Official Journal published Commission Regulation 1247/2009 imposing a provisional anti-dumping duty on imports of certain molybdenum wires originating in the People's Republic of China.

The product concerned is molybdenum wire, containing by weight at least 99.95% of molybdenum, of which the maximum cross-sectional dimension exceeds 1.35 mm but does not exceed 4.0 mm, originating in the People's Republic of China, currently falling within CN code ex 8102 96 00.

It is recalled that the anti-dumping investigation was initiated on 8 April 2009, as a result of a complaint lodged on 23 February 2009 by the European Association of Metal (EUROMETAUX) (the “complainant”) on behalf of a producer representing a major proportion, in this case more than 25%, of the total Community production of molybdenum wires. The complaint contained prima facie evidence of dumping and of material injury caused by such dumping which was considered sufficient to justify the opening of a proceeding.

On the basis of the investigation, it was provisionally concluded that the imports from the People's Republic of China have caused material injury to the Community. Therefore, the imposition of provisional anti-dumping measures would allow the Community industry to secure the viability of its molybdenum wire business and consequently the entire sector which depends on the existence of this core product.

The rate of the provisional anti-dumping duty applicable to the net, free-at-Community-frontier price, before duty, of the product concerned shall be 64.3 %.

Regulation 1247/2009 entered into force on 19 December 2009. It will apply for six months.

D. Repayment of anti-dumping duty and partial reopening of anti-dumping proceedings - ironing boards

On 18 December 2009, the Official Journal published a notice concerning anti-dumping measures on imports of ironing boards originating in the People's Republic of China and a partial reopening of the anti-dumping investigation concerning imports of ironing boards originating, *inter alia*, in the People's Republic of China.

The products concerned are ironing boards 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 originating in the People's Republic of China.

It is recalled that by its judgment of 1 October 2009 in Case C-141/08 P, the ECJ annulled Council Regulation 452/2007 of 23 April 2007 imposing a definitive anti-dumping duty and collecting definitively the provisional duty on imports of ironing boards originating in the People's Republic of China and Ukraine, insofar as it concerns imports into the EC of ironing boards manufactured by Foshan Shunde Yongjian Housewares and Hardware Co. Ltd. Consequently, the definitive anti-dumping duties paid pursuant to Regulation 452/2007 and the provisional duties definitively collected should be repaid or remitted. Moreover, imports into the EU of ironing boards manufactured by Foshan Shunde Yongjian Housewares and Hardware Co. Ltd are no longer subject to the anti-dumping measures imposed by Regulation 452/2007

The Commission has decided to reopen the anti-dumping investigation concerning imports of ironing boards originating, *inter alia*, in the People's Republic of China. The reopening is limited in scope to the implementation of the above mentioned judgment as far as Foshan Shunde Yongjian Housewares and Hardware Co. Ltd is concerned.

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 any information within 20 days of the date of publication of the notice in the Official Journal, unless otherwise specified. All interested parties may also apply to be heard by the Commission within the same 20-day time limit.

VI. *The Week Ahead*

A. Council

- 21 December 2009: Environment Council (Brussels)

*