

BRUSSELS MONITOR

A Weekly Review of EU Trade Policy Developments Affecting Japan

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I. WTO Watch

WTO expected to rule on EU's Boeing complaint in June

On 12 January 2010, WTO officials announced that the WTO will “deliver an interim ruling on the European Union’s complaint over multi-billion dollar US state aid to aircraft maker Boeing in June”.

The interim ruling will mark the next stage in the long-running trade dispute between the US and the EU over subsidies or state aid to their respective aircraft giants, Boeing and Airbus. In 2004, the Bush administration filed one of the biggest complaints in WTO history, accusing the EU of illegally subsidising the European aircraft manufacturer Airbus, a global competitor of Boeing. The EU reacted by filing a counterclaim alleging that Boeing had received illegal indirect subsidies through its contacts with the US Department of Defence and NASA. According to the EU, Airbus lost more than \$20 billion “due to the United States’ payment of ‘lavish’ illegal subsidies to its own plane maker Boeing.” The EU claimed that the subsidies benefiting Boeing have allowed it to apply an aggressive pricing policy of its aircraft, resulting in lost sales for Airbus and price suppression on certain markets.

In its counterclaim, the EU also targeted tax breaks granted to Boeing by the US states of Washington, Kansas and Illinois, particularly those in Washington, where an estimated \$3.2 billion was granted over 20 years to Boeing. However, Gary Locke, the Washington governor at the time when the state tax breaks were granted to Boeing, argued that “the tax breaks weren’t just for Boeing, even though the company and the 787 got all the press about them. The tax breaks [were] for the entire aerospace industry. Vendors that supply both Boeing and Airbus, including engine makers and even Airbus itself, [could] receive tax breaks”.

The date of the final ruling on the EU’s complaint has not yet been set. It should be noted that the WTO panel issued its interim ruling on the parallel US Airbus complaint in September 2009. Notwithstanding the fact that the outcome of this ruling has never been made public, EU and US sources have confirmed that the WTO considered that some aid provided by the EU to Airbus was illegal.

In any event, as both parties to the dispute have the possibility of filing an appeal against any final judgment, the legal battle over the subsidies granted to the EU and US aircraft giants is expected to last for several years.

II. European Union: Trade

EU publishes new codified version of anti-dumping Regulation

On 22 December 2009, the EU published the newly approved Regulation 1225/2009, which replaces Regulation 384/96 on the protection of dumped imports from countries outside of the EU. The new Regulation codifies the numerous amendments to Regulation 384/96 made over the last decade. Thus, while the new Regulation does not change the substance of anti-dumping law in the EU, it does provide a single legislative text in place of the numerous amended texts and therefore aims to make the law clearer.

Despite the lack of substantive changes in the new Regulation, businesses should find this new document a useful tool in familiarising (or re-familiarising, as the case may be) themselves with the

EU's anti-dumping law. As businesses are doubtlessly aware, under conditions set out by WTO rules, the EU is allowed to protect its domestic market from certain harmful import practices through the use of trade defence measures such as anti-dumping duties, countervailing duties and safeguard measures. The EU makes frequent use of these defence measures, but anti-dumping duties are by far the most commonly used defence.

A non-EU company is deemed to be dumping products on the EU market if it is exporting a product to the EU at prices lower than the normal value of the product (the domestic prices of the product or the cost of production) on its own domestic market.

The European Commission is responsible for investigating EU industry's allegations of dumping by exporting companies located in non-EU countries. It usually opens an investigation after receiving a complaint from the EU producers of the product concerned, but it can also do so on its own initiative. After receiving a complaint from the EU producers of the product concerned, the Commission publishes a notice in the Official Journal opening an anti-dumping proceeding. The maximum time limit for an investigation under these proceedings is 15 months.

In order for the EU to apply anti-dumping measures, an investigation must show not only that dumping has occurred, but also that the EU industry has suffered material injury, that there is a causal link between the dumping and this injury, and that the imposition of anti-dumping measures would not be against the overall EU interest. Thus, the new anti-dumping Regulation sets out specific rules and definitions regarding, among others:

- the procedure by which the EU industry may lodge complaints and by which the EU institutions investigate dumping practices;
- the methods of calculating a product's normal value;
- the calculation of dumping margins (generally the difference between the normal value and export prices);
- the treatment of companies operating in non-market economies; and
- the factors to be considered in finding injury to the EU industry.

Businesses, particularly those operating in markets where the European Commission's Directorate General for trade has previously shown an interest, may like to take this opportunity to review the new anti-dumping Regulation and determine whether their products are at risk of attracting anti-dumping duties in the future.

Regulation 1225/2009 can be accessed at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:343:0051:0073:EN:PDF>.

III. EU Competition

Deutsche Telekom and France Telecom seek approval for proposed UK transaction

On 11 January 2010, Deutsche Telekom and France Telecom made a notification to the European Commission of their plans to combine their UK mobile operations, in order to obtain merger control approval for the deal. The negotiations for the transaction, which would merge the operations of T-Mobile UK and Orange, began in September 2009, with a final deal agreed in November 2009. However, the companies cannot proceed with implementing the transaction until they have received

the necessary regulatory approvals, including approval of the deal from a competition law perspective.

While the transaction will primarily affect the UK mobile telephony market, the fact that the two parent companies have substantial business operations in other EU Member States means that the transaction is subject to the Commission's jurisdiction rather than the jurisdiction of the UK's Office of Fair Trading (OFT). Nonetheless, EU law allows Member State authorities to request that all or part of a merger control review be referred from the Commission to the national authorities.

Such referral requests are relatively rare and requests by the OFT are even rarer, with only three referrals being granted to the UK since the current Merger Control Regulation came into force in 2004. Nonetheless, the importance of this case and the fact that UK competitors of the parent companies have been loudly demanding a national review may convince the OFT to take the unusual step. Indeed, on 14 January, the OFT invited interested parties to submit comments on the implications of the merger on the UK market prior and whether or not the OFT should seek a referral prior. If the UK is to seek a referral, it must do so within 15 working days of receiving its copy of the notification submitted to the Commission, which would be approximately 2 February. Alternatively, the OFT could simply seek unofficial assurances from the Commission that the Commission will review the markets and circumstances of the transaction in the same way that the OFT would. In this situation, the OFT might not feel compelled to request jurisdiction.

If the UK does not seek a referral, the Commission will have until 15 February to review the transaction and determine whether the transaction gives rise to potential competition concerns. Given that T-Mobile and Orange are two large mobile operators in an already very concentrated market (there are only five mobile network operators in the UK), it is quite possible that the Commission could decide to open a more in-depth investigation into the transaction or threaten to veto the transaction unless the parties offer commitments to quell any competition concerns. If such an in-depth investigation is opened, or if the parties offer commitments, the 15 February deadline would be delayed.

IV. European Union: Regulatory

Upcoming European Parliament report on WEEE recast

Businesses active in the electrical and electronic equipment (EEE) sector will likely be closely following the recast of the WEEE (waste electronic and electrical equipment) Directive which is currently underway. The draft recast of the WEEE Directive was originally published by the Commission in December 2008 and is now passing through the EU's co-decision process. Following recent comments from the rapporteur (draftsman), MEP Karl-Heinz Florenz, in charge of preparing a European Parliamentary report on the recast and a briefing in December 2009 by a Commission official responsible for the recast, a number of areas likely to be of significant interest to producers of electrical and electronic equipment have been flagged.

The European Parliament's report on the recast of the WEEE Directive is underway, which will eventually be voted on by the full Parliament sitting in plenary. Rapporteur Florenz commented on 25 November 2009 that it will likely not be ready until the beginning of January 2010, although the due date now looks likely to be pushed back until the end of the month. The key question remaining for the report is why collection rates across the EU have been so low, when the goal envisioned is 65%.

According to 2008 European Commission data, only a third of electronic waste is being treated in line with the law, with the rest going to landfill or being ineffectively treated outside the EU. MEP Florenz has also made known that there are still plenty of problems regarding “definition” in the Member States and feels that there is a need to find out more on this issue before the report can be completed.

The rapporteur is also concerned that while some countries recycle up to 16 kilos of WEEE per capita, others manage less than 1 kilo. According to Florenz, a very high recycling target is unfair on manufacturers who face a wide disparity in costs since they are responsible for collection. He suggests, instead, an interim target of 50% or 55% that could be effective from 2013 instead of 2016.

In terms of producer responsibility, Florenz feels producers should be responsible for both collection and disposal since they are the only ones who have an influence on the design process. The rapporteur considers that making producers responsible for take back and recycling is the only way to ensure that manufacturers invest in making their products from easily recyclable materials. Manufacturers, on the other hand, have been lobbying hard to be able to share the take back and recycling obligations with local authorities.

The MEP is also keen on the idea of a single European register as a way to simplify procedures, particularly for SMEs. This move is still being opposed by Member States.

Dealing with the issue of illegal shipments of WEEE is also a main priority for the rapporteur. He is particularly concerned that a lot of valuable material is being sent out of the EU to countries such as China where it is considered to be inappropriately treated.

Meanwhile, Commission officials seem to be out of step with the Parliament, reiterating the need for the introduction of a 65% collection target. The Commission also remains keen to avoid the fragmented application of the WEEE Directive throughout the EU, proposing to introduce an explicit reference to the “Community market” in producer and market definitions and to introduce:

- one registration for the EU market;
- one fee in the EU market;
- one legal seat in the EU;
- a requirement for inter-operable registers;
- a requirement for all information relevant across the EU market to be entered into one register;
- the intra-EU transfer of information, including for the transfer of money; and
- agreement on the format and frequency of reporting.

The Commission also wants to clarify the scope of the WEEE Directive, in particular with regard to exclusions and issues regarding differentiating WEEE from private households from WEEE from other sources. The Commission furthermore wants to increase recovery targets and encourage greater producer responsibility, notably via the producer’s role in collection targets and financing.

However, Member States have highlighted disquiet over proposals to introduce the goal of a 65% collection target to be reached by all Member States by 2016 and to extend producer responsibility. Member States’ concerns relate to the Commission’s definition of “producer”, in particular the plans to extend producer responsibility to make producers responsible for funding all costs of collecting

WEEE. It appears that there is also dispute as to the definition of “costs” between Member States and this matter needs to be clarified.

With regard to the timing of the recast, the head of the WEEE team at the UK’s department for business, innovation and skills (BIS) has said that he “would bet money” that agreement on the text of the recast would not be reached before the end of 2010 and that his “best guess” would be that the new WEEE Directive would only enter into force in Member States in late 2012 or early 2013.

Mr. Florenz’s report is expected to be voted on by the Parliament’s Environment Committee in April 2010 before the proposed amendments are put to the vote in a Parliamentary plenary session, anticipated for June 2010. A Council meeting has reportedly also been scheduled for June 2010 at which the Parliament’s proposed amendments are set to be considered.

V. *Dumping Watch*

A. **Notice of initiation of partial interim review – polyethylene terephthalate film**

On 14 January 2010, the Official Journal published a notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of polyethylene terephthalate (“PET”) film originating in India.

The product concerned is PET originating in India, currently falling within CN codes ex 3920 62 19 and ex 3920 62 90.

It is recalled that the measures currently in force are a definitive anti-dumping duty imposed by Council Regulation 1292/2007 on imports of PET film originating in India, as amended by Council Regulation 15/2009.

The request was lodged by Vacmet Packagings (India) Private Limited (the “applicant”), an exporting producer in India. The review is limited in scope to the examination of dumping as far as the applicant is concerned.

The request is based on *prima facie* evidence, provided by the applicant, that the circumstances on the basis of which measures were established have changed and that these changes are of lasting nature. The applicant provided *prima facie* evidence that the continued imposition of the measure at its current level is no longer necessary to offset dumping. In particular, the applicant alleges that there have been significant changes in the production process of the company and that these changes have led to a substantially lower dumping margin since the imposition of the existing measures. A comparison of the applicant’s domestic prices and its export prices to EU indicates that the dumping margin appears to be substantially lower than the current level of the measure.

Having determined, after consulting the Advisory Committee, that sufficient evidence exists to justify the initiation of a partial interim review, the Commission has initiated a review.

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, unless otherwise specified. All interested parties may also apply to be heard by the Commission within the same 37-day time limit.

The investigation shall be concluded within 15 months of the date of the publication of the notice in the Official Journal.

B. Notice of initiation of partial interim review – polyethylene terephthalate film

On 14 January 2010, the Official Journal published a notice of initiation of a partial interim review of the countervailing measures applicable to imports of polyethylene terephthalate (“PET”) film originating in India.

The product concerned is PET film originating in India, currently falling within CN codes ex 3920 62 19 and ex 3920 62 90.

It is recalled that the measures currently in force are a definitive countervailing duty imposed by Council Regulation 367/2006 on imports of PET film originating in India, as amended by Council Regulation 15/2009.

The request was lodged by Vacmet Packagings (India) Private Limited (the “applicant”), an exporting producer in India. The review is limited in scope to the examination of subsidisation as far as the applicant is concerned.

The applicant has provided *prima facie* evidence that the circumstances with regard to subsidisation on the basis of which measures were established have changed significantly and that these changes are of lasting nature. The applicant alleges that the continued imposition of the measure on imports of the product under review at its current level is no longer necessary to offset the subsidisation. According to the Commission, the applicant has provided sufficient evidence that its subsidy amount has decreased well below the duty rate currently applicable to it. This reduction in the overall subsidy level is mainly due to a significant drop in the benefits availed of under the Duty Entitlement Passbook Scheme.

Having determined, after consulting the Advisory Committee, that sufficient evidence exists to justify the initiation of a partial interim review, the Commission has initiated a review.

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, unless otherwise specified. All interested parties may also apply to be heard by the Commission within the same 37-day time limit.

The investigation shall be concluded within 15 months of the date of the publication of the notice in the Official Journal.

VI. The Week Ahead

A. Council

- 18-19 January 2010: Agriculture and Fisheries Council (Brussels)
- 19 January 2010: EcoFin Council (Brussels)

- 20-22 January 2010: Informal Justice and Home Affairs Council (Toledo)

B. Parliament

- 18-21 January 2010: European Parliament plenary session (Strasbourg)

C. OECD

- 19-20 January 2010: Presentation of the Economic Assessment of Israel, and the OECD Labour Markets and Social Review of Israel, with participation of the OECD Secretary-General. Jerusalem, Israel.
- 19-20 January 2010: Evolving Agricultural Policies in a Changing World, OECD conference organised with the US Department of Agriculture. Washington, DC, US.
- 20 January 2010: Publication of Economic Survey of Switzerland.
- 21 January 2010: Publication of Economic Survey of Chile.

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