

BRUSSELS MONITOR

A Weekly Review of EU Trade Policy Developments Affecting Japan

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IN THIS ISSUE

- I. *WTO Watch***
China denies trade protectionism through Internet censorship
- II. *European Union: Trade***
New Commissioners, some of whom will have meaningful influence on trade, on course to take office in February 2010
- III. *EU Competition***
French Competition Authority accepts commitments concerning Orange's exclusive rights relating to iPhones in France
- IV. *European Union: Regulatory***
Hopes of reducing copyright levies on electronic goods squelched for the time-being
- V. *Dumping Watch***
 - A. Definitive anti-dumping duty – ironing boards**
 - B. Notice of impending expiry of countervailing measures - certain broad spectrum antibiotics**
- VI. *The Week Ahead***
 - A. Council**
 - B. OECD**

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I. WTO Watch

China denies trade protectionism through Internet censorship

On 25 January 2010, a spokesman for the Chinese Ministry of Industry and Information Technology declared as follows: “Any accusation that the Chinese government participated in cyber attacks, either in an explicit or indirect way, is groundless and aims to denigrate China.”

This statement is the direct response of the Chinese government to Google’s announcement on 13 January 2010 that it is not willing to continue censoring its Chinese search engine due to tougher online censorship and the recent cyber attacks targeting certain human rights activists’ email accounts.

Google’s decision was largely approved by the US-based free speech group, known as the First Amendment Coalition, and the European Centre for International Political Economy based in Brussels. These organisations believe that Internet censorship by China equates to trade protectionism, represents a non-tariff barrier and therefore violates the WTO rules that are binding on China as of its accession to the WTO in 2001.

The First Amendment Coalition has petitioned the US Trade Representative to file a complaint at the WTO against China for illegally restricting the international trade by preventing foreign companies from competing, via the Internet, on the Chinese technology market. In particular, it is argued that China’s “Great Firewall”, i.e., the system of filters, degrades the performance of websites based outside the Chinese territory. For instance, non-Chinese based websites take extra seconds to load, compared to Chinese search engines. In this respect, it is to be recalled that two years ago, Google decided to physically relocate its Chinese language search service inside China and to censor its search services in order to gain greater access to the Chinese market.

The US free speech group considers that online services “count as imports to which China is supposed to be opening itself, even if they are delivered over a wire instead of in a shipping crate (...) While the WTO agreements allow countries to set their own standards for public morals and order, disguised protectionist measures are forbidden”. According to the American proponents of freedom of speech, Chinese censorship reserves the Chinese technology market “only for government registered actors that are politically reliable in the eyes of Beijing”.

It is, however, interesting to note that another Internet giant, Microsoft, did not follow Google. Indeed, on 25 January 2010, Bill Gates argued that “Chinese efforts to censor the Internet have been very limited”. He added that “You’ve got to decide: do you want to obey the laws of the country you’re in or not? If not, you may not end up doing business there”.

In any event, according to a Chinese Internet security official, Google has not yet officially reported its complaint to the Chinese authorities. “We have been hoping that Google will contact us so that we could have details on this issue and provide them help if necessary”, declared Zhou Yonglin earlier this week, who is the deputy chief of operations at the China national computer network emergency response technical team.

II. European Union: Trade

New Commissioners, some of whom will have meaningful influence on trade, on course to take office in February 2010

The persons nominated for the new European Commission appeared in individual hearings before the European Parliament during the month of January (the latter institution must give its approval before the new Commission can take office). Businesses might be interested in knowing what can be expected from those Commissioners-designate who are to head portfolios that could be relevant for trade in all sorts of goods which are placed on the EU market.

Karel De Gucht (Trade): Businesses may already be aware of the name of this Belgian liberal party member, who has, at least until recently, a reputation for being free-trade oriented. This reputation seems to have created ripples among the more protectionist Members of the European Parliament (MEPs), who feared that his leadership may weaken the EU's trade defence instruments (e.g., the basic anti-dumping Regulation) and would be more permissive towards foreign exporters. During his hearing, De Gucht clarified that he intends to keep the EU's trade defence instruments unchanged at least until the conclusion of the Doha Round: "As far as the trade defence instruments are concerned... we should do it after the Doha round", he said.

Nevertheless, in a previous written questionnaire sent by the Parliament, De Gucht underlined his general commitment to open markets backed by a rules-based international trading system, even though respect for social and environmental standards with regard to goods could limit this free trade policy.

De Gucht also stated that he will push for the origin label "*made in...*" to become mandatory for certain goods (e.g., textiles, shoes and jewellery). This move is particularly in the interest of countries such as Italy or Spain, which hope that such a label will serve as an incentive for consumers in the EU to purchase locally produced instead of imported products.

On the other hand, De Gucht has expressed his opposition to carbon emission-related import taxes, stating that they might lead to a trade war. Such carbon taxes, which France's Nicolas Sarkozy, among others, wants levied on imports from countries which do not have similar levels of environmental standards combating climate change as the EU's, are currently a much debated and controversial topic of interest among EU governments. De Gucht's resistance to their introduction is a positive sign for exporters from, e.g., China, which is perceived to be one of the countries that could be adversely affected by the introduction of such taxes on relevant imports entering the EU.

De Gucht will also aim for a speedy conclusion to the Doha Round and on bilateral and regional trade deals. Such deals are envisaged with, among others, India, ASEAN countries, Ukraine, Canada and Latin American countries. In the short term, agreements are to be finalised with South Korea, and also with Peru, Colombia, Central American countries and Iraq. As free trade agreements generally lower tariffs on almost all goods traded between the respective parties, they could have indirect effects on trade from other countries that enter the EU.

Antonio Tajani (Enterprise and Industry): The Italian Antonio Tajani, a former MEP and Commissioner for transport since May 2008, will be responsible for Enterprise and Industry, and the European Chemicals Agency (ECHA) which handles REACH.

Outlining his industrial policy, Tajani emphasised the following priorities that may be of particular interest to businesses:

- Creating eco-efficient policies and environmentally friendly procedures for manufacturers.

- Preventing relocation of EU industries to non-EU countries where there are fewer rules.
- Support for small to medium sized enterprises (SMEs).
- External dimension: help companies gain access to third country markets.
- Consolidation of the Internal Market and development of uniform standardisation.

Regarding the chemicals legislation REACH, Tajani mentioned that a working group was looking at problematic issues, in order to make its implementation easier, particularly for SMEs. The Council had raised concern over compounds, and this would need to be addressed in light of the 2012 revision, along with issues like nanotechnology – a topic which is only now becoming visible at EU level. Tajani did not agree that the REACH registration deadlines, laid by the legislation, should be extended. He also stated that a border tax (the carbon tax discussed above) was a possibility under the Emissions Trading System (ETS), but that he would need to wait for an assessment (as can be seen, the carbon tax idea is gaining notoriety, and will prove highly controversial in the future).

Michel Barnier (Internal market and services): Frenchman Michel Barnier served as European Commissioner for regional policy between 1999 and 2004. He was elected to the European Parliament and is highly experienced in European political affairs. Michel Barnier outlined priorities such as (1) the full and accurate implementation of the Services Directive, which would serve the purpose of bolstering SMEs, (2) promoting a European Patent, and (3) fighting counterfeiting and piracy, also through the WTO.

Janez Potočnik (Environment): The Slovenian liberal party member was Commissioner for Science and Research since 2004 and previously Minister for European Affairs in Slovenia. His top priority will be the proper implementation of the mass of new legislation enacted during the previous Commission's term (e.g., the new ecodesign Directive, and the new RoHS and WEEE Directives which are still to be adopted). Janez Potočnik also stressed that he would work to improve the economics of environmental legislation: predictable and long term plans and positions were, in his view, needed for minimal disruption of business. Good environmental legislation should furthermore create jobs and profits in Europe. He will also focus on promoting environmentally-friendly products.

Connie Hedegaard (Climate change): Businesses might remember the name of this Danish lady since she was Minister for the United Nations Climate Change Conference in Copenhagen in 2009. She will head a newly created Directorate-General for Climate Action which will handle a horizontal competency that mainstreams climate change in all the Commission's policies. Hedegaard stressed that she will work to build momentum for a binding international agreement to succeed the Kyoto Protocol, after the failure of the Copenhagen Conference. She stated that much of the climate legislation needed in the EU, e.g. on energy efficiency and CO2 emission reductions, is already in place and "must now be implemented properly". On punitive trade measures she was unequivocal, describing a carbon tax for goods entering the EU from third countries as "the lowest-common denominator" and arguing they would hinder the chances of an international agreement – although she stopped short of ruling it out completely.

Catherine Ashton (External relations): British national Catherine Ashton was the EU's Trade Commissioner within the exiting college of Commissioners. She is a consensus-seeking figure and played a quiet but pivotal role in pushing forward the EU-South Korea free trade agreement. She now holds the newly created post of High Representative of the Union for Foreign Affairs and Security Policy and will also be a Vice-President of the European Commission. She will be in charge of conducting the EU's common foreign and security policy, supported by the new European External Action Service (EEAS). Even though trade does not belong to the EEAS' initial core competences, it

should be kept in mind that trade policy fulfils a key role in the EU's foreign policy. Therefore, it can be expected that the EEAS under the supervision of Ashton will, in due time, become an important player in trade negotiations, e.g. concerning free trade agreements.

The European Parliament vote on acceptance of the new Commissioners was due to take place on 26 January, but in consequence of much drama generated over Bulgaria's erstwhile candidate, Rumiana Jeleva, who was felt to have hidden some significant facts about her past involvement in business dealings, and who consequently stepped down from handling a Commission post, the vote has been delayed until 9 February. It is extremely likely that the overall vote will be positive. Thereafter, the new Commission could take office as early as 10 February 2010.

III. EU Competition

French Competition Authority accepts commitments concerning Orange's exclusive rights relating to iPhones in France

On 11 January 2010, the French Competition Authority made binding the commitments offered by Apple and Orange concerning the latter's exclusive rights relating to the iPhone in France. In view of these commitments, the French Competition Authority has decided to close its investigation in this case.

On 17 December 2008, the French Competition Authority found in an interim measures decision that Orange's exclusive rights relating to Apple's iPhone in France were *prima facie* contrary to Article 101 TFEU (formerly Article 81 EC), as well as the equivalent provision under French law, and created serious and immediate risks for competition on the French mobile telephony services market. In its decision, the Competition Authority identified several relevant markets, namely, the market for the provision of mobile telephony services (where competition was limited and Orange was the market leader with a market share of 43.5%), the market for mobile handsets (where Apple had a relatively weak position with its iPhone), the market for MP3 players (where Apple held approximately 50% of the market) and the market for the online downloading of paid music (where Apple held approximately 60% of the market with iTunes).

The French Competition Authority then analysed the complex series of contractual arrangements between Apple, Orange and the authorised retailers appointed for the distribution of the iPhone. The Competition Authority began by assessing the exclusive rights granted by Apple to Orange in France. It appears that the contracts imposed an exclusive supply obligation on Apple in favour of Orange. Orange became the exclusive wholesaler of the iPhone for the purpose of supplying authorised retailers appointed by Apple in France. In addition, the decision indicated that Orange was appointed the exclusive provider of mobile telephony services for the iPhone in France. Thus, retailers could only sell the iPhone with an Orange contract for telephony services. According to the decision, end customers could only unlock their iPhone for use with another mobile network operator subject to the payment of €100. The contracts between Apple and Orange were concluded for five years, although Orange could terminate the contracts after three years without any penalty.

After concluding that the Vertical Agreements Block Exemption did not apply to the agreements between Orange and Apple as a result of several hardcore restrictions contained within the agreements, the French Competition Authority conducted an individual assessment of the exclusivity clauses. The Competition Authority concluded that anti-competitive effects resulted from the strong market position of Orange, the fact that the contracts affected a high value segment of the market

(namely, end customers of an innovative, high-end product) and the long duration of the contracts. The Competition Authority rejected the efficiency claims put forward by Apple and Orange to justify the exclusivity obligations. Moreover, the French Competition Authority considered that the contractual restrictions created serious and immediate risks for competition on the French mobile telephony services market.

In light of the foregoing, the French Competition Authority ordered Apple and Orange to suspend the application of the exclusive rights and the restrictions on cross-supplies until the Competition Authority adopted its final decision on the merits. Following this, Orange's main competitors (namely SFR and Bouygues) concluded agreements with Apple for the distribution of the iPhone and for the provision of mobile services for the iPhone in France.

Subsequently, Apple and Orange offered commitments in order to solve the competition concerns identified by the French Competition Authority. In particular, Apple and Orange offered not to enter into any exclusivity agreement for the wholesale distribution of the iPhone and for the provision of mobile services for the iPhone in France for a period of three years. However, Apple and Orange reserved their right to enter into non-renewable exclusive agreements in relation to future iPhone models, provided that the duration does not exceed a period of three months for each new model. The French Competition Authority has now considered that these commitments eliminate the competition concerns identified in its interim measures decision and has decided to close its investigation.

IV. European Union: Regulatory

Hopes of reducing copyright levies on electronic goods squelched for the time-being

Talks to lower and harmonise copyright levies on electronic equipment capable of copying copyrighted material fell flat at the beginning of January this year, when the industry advocacy group, Digital Europe, decided to drop the dialogue.

Levies are currently being imposed by collecting societies on a national basis, on reproduction media and equipment (CDs, DVDs, computers, MP3 players, printers, etc.) and paid to the artists to remunerate them for loss of copyright earnings. Although there is a framework EU-wide Directive in place on copyright (Directive 2001/29/EC), it does not include within its provisions the harmonisation of levies which European governments can impose on manufacturers and importers of copying media and equipment.

Manufacturers of electronic equipment claim that the levies hinder innovation and distort trade by charging vastly dissimilar prices in the different Member States; on the other hand, the copyright collecting societies assert that the levies are a necessary source of remuneration for authors, composers and other right holders, who would otherwise lose income to private copying.

Collecting societies find that it is inappropriate to define at the EU level either the products on which levies must and must not be imposed, or the systems used to calculate such levies. In contrast, the electronics industry feels that this is exactly what is necessary.

The levies, which Member States are allowed to charge in exchange for allowing certain private copying pursuant to the copyright Directive 2001/29/EC, are currently charged in 22 of the 27 Member States and can vary dramatically, both in terms of the types of product subject to the charges and the level of the charges, underscoring the need to reach consensus on a copyright levying scheme.

The levies are imposed on manufacturers, importers or distributors of analogue and digital equipment or media. The five Member States that currently do not have private levies in place are Ireland, the UK, Malta, Cyprus and Luxembourg.

Art vs. industry is not a new match. EU Commissioner McCreevy had proposed in 2006 a revision to the copyright levy system in the EU. This attempt had sought to reduce both the total amount of the levies and limit the types of products which could be subject to levies, while also implementing uniform charges throughout the EU. The proposal faced strong opposition from several Member States, including France, which was hesitant to reduce its relatively high charges on the goods.

Commissioner McCreevy resurrected the idea in 2008, with the creation of a European discussion forum on the levies between stakeholders, most notably electronics manufacturers, consumer groups and copyright collecting societies. It was hoped that a more moderate approach would foster much-needed goodwill in reaching a decision.

Undoubtedly the tension between the opposing sides has only been stoked, since discussions have halted without results. Exporters to the EU will want to keep an eye out for changes to copyright levies in the future.

In December 2009, the Commission's DG-Internal Market launched a public consultation on audiovisual and media policy, copyright and the single market. The consultation was a forum for exporters, manufacturers, consumers and creative artists to voice their comments on a Community copyright law, among other issues. It is meant to be a wide-ranging debate on the role of legal online markets and explores a variety of copyright management models that may induce a more rapid development of such markets. The consultation closed its call for comments on 5 January 2010. For more information, businesses may like to visit:

http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm.

Next up (and perhaps in consequence to this debate) could be a push for a Community-wide copyright law to create a single market for copyrights. This solution would remedy the varying state-by-state systems of copyright levies, bring transparency and legal security, and importantly, reduce transaction and licensing costs. Digital Europe, an advocacy group of the European digital economy representing the interests of the information technology, consumer electronics and telecommunications sectors, has reportedly urged that the next European Commission take "regulatory measures".

With the new European Commission taking office during February 2010, plans for renewing discussions on a copyright levy scheme could well be on the horizon.

Toyota recalls unspecified number of vehicles in Europe because of faulty accelerator pedals

Last autumn, Toyota recalled 4.2 million vehicles in the US because floor mats were interfering with the pedals. At the time, Toyota's press statement acknowledged "the potential for an accelerator pedal to get stuck in the full open position due to an unsecured or incompatible driver's floor mat". In January 2010, Toyota announced the suspension of all sales of certain models in the US, this time because of a defect in the accelerator pedals themselves.

On 28 January 2010, Toyota announced the recall of an unspecified number of vehicles in Europe and of one more million cars in the US. Toyota did not specify the EU countries affected by this measure and stated that contact would be made directly with the owners of such cars. The recall in Europe seems to be due to faulty accelerator pedals, reported as being hard to depress and even at times stuck to the floor.

While the models affected by the recall in Europe have not been announced, five models subject to the expanded recall in the US have been listed: the Corolla, Venza, Matrix and Pontiac Vibe (a joint product of GM and Toyota) produced in 2009 and 2010, and the Highlander produced from 2008 to 2010.

Toyota does not plan on suspending its production in Europe, and the cars currently being assembled will be equipped with another type of accelerator pedal.

The news of the recall's spread to the European market sent Toyota's shares further downward, dropping 3.9% on 27 January at the Tokyo Stock Exchange, and caused at least one investment agency to warn of a possible downgrading of Toyota's debt.

V. *Dumping Watch*

A. **Definitive anti-dumping duty – ironing boards**

On 28 January 2010, the Official Journal published Council implementing Regulation 77/2010 amending Regulation 452/2007 imposing a definitive anti-dumping duty on imports of ironing boards originating, *inter alia*, in the People's Republic of China (PRC).

The product concerned is ironing boards, whether or not free-standing, with or without a steam soaking and/or heating top, including sleeve boards, and essential parts thereof, i.e., the legs, the top and the iron rest, currently falling within CN codes ex 3924 90 00, 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 PRC.

It is recalled that the measures currently in force are definitive anti-dumping duties imposed by Council Regulation 452/2007. The new exporter review was initiated on the basis of a request lodged, and information provided, by Greenwood Houseware (Zhuhai) Ltd (the "applicant"), an exporter from the PRC. The applicant claimed that it was not related to any of the exporting producers in the PRC subject to the anti-dumping measures in force with regards to ironing boards. Furthermore, it claimed that it had not exported ironing boards to the Community during the original investigation period (the "original IP", i.e., the period from 1 January 2005 to 31 December 2005), but had started to export ironing boards to the EU thereafter.

The Commission examined the evidence submitted by the applicant and considered it sufficient to justify the initiation of a review. The investigation of dumping covered the period from 1 October 2007 to 31 March 2009. The investigation confirmed that the applicant had not exported the product concerned during the original IP and that it had begun exporting to the EU after this period. According to the Council, the anti-dumping investigation has shown the existence of dumping. The Council has therefore decided that the anti-dumping duty applicable to the applicant should be levied retroactively on imports of the product concerned.

The rate of the definitive anti-dumping duty applicable to the product concerned is 22.7% for Greenwood Houseware (Zhuhai) Ltd.

Council Regulation 77/2010 entered into force on 29 January 2010.

B. Notice of impending expiry of countervailing measures - certain broad spectrum antibiotics

On 28 January 2010, the Official Journal published a notice of the impending expiry of certain countervailing measures, namely, a countervailing duty imposed on certain broad spectrum antibiotics originating in India.

The product concerned is amoxicillin trihydrate, ampicillin trihydrate and cefalexin not put up in measured doses or in forms or packings for retail sale, falling within CN codes ex 2941 10 10, ex 2941 10 20 and ex 2941 90 00, originating in India.

It is recalled that the current measure in force is a countervailing duty imposed by Council Regulation 713/2005, as last amended by Council Regulation 1176/2008. The measure is due to expire on 14 May 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 subsidisation and injury. Should the Commission decide to review the measures concerned, importers, exporters, representatives of the exporting country and EU producers will then be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request.

VI. The Week Ahead

A. Council

- 7-9 February 2010: Informal Competitiveness Council (Internal market, Industry and Research) (San Sebastian)

B. OECD

- 2 February 2010: OECD Economic Assessment of China, presented by the OECD Secretary-General. Beijing, China.
- 4-5 February 2010: OECD-Asian Senior Budget Officials meeting. Bangkok, Thailand.
- 5 February 2010: OECD statistics news releases: Composite Leading Indicators.

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