

BRUSSELS MONITOR

A Weekly Review of EU Trade Policy Developments Affecting Japan

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I. WTO Watch

Trade Ministers reaffirm their commitment to concluding WTO Doha talks

On 30 January 2010, Trade Ministers representing some 17 WTO countries, including China, India, Australia, Brazil, Japan as well as the EU, gathered for an informal meeting in Davos, Switzerland, and reaffirmed their commitment to finish the Doha Round negotiations by the end of 2010. They declared that they would continue their efforts “to resist protectionism pressure at home”.

According to the Australian Trade Minister Simon Crean, “there is a real determination to continue to try and find breakthroughs that will enable it [the Doha Round] to be concluded this year”. For her part, Doris Leuthard, the Swiss Minister of Economy and host of the Davos meeting, stated that “the opening-up of markets is the best we can do to fight the crisis, to better stabilise our budgets and to contribute to the recovery of the global economy which will induce overall job creation. The conclusion of the Doha Round will be a strong multilateral tool to that purpose”. US Trade Representative Ron Kirk, however, was absent from the ministerial meeting in Davos.

The Doha Round was launched in the Qatari capital in 2001 and aims to achieve trade liberalisation by cutting agriculture subsidies and tariffs on industrial goods in order to dismantle obstacles to trade for poor countries. However, deadlines to conclude the talks have been repeatedly missed since no consensus has yet been reached over various issues, including how much the US and the EU should cut farm aid and the extent to which developing economies such as China, India and South Africa should lower tariffs.

Thus, although G20 leaders agreed last year in Pittsburgh to finalise the Doha Round by December 2010, certain analysts consider that the current deadline is not realistic, principally because the US has been unwilling to negotiate on the basis of the WTO compromise documents that have been prepared in order to confer a special trade package on the poorest nations. In this respect, on the eve of the Davos meeting, the South African Trade Minister Rob Davies stated as follows: “One of the biggest trading partners in the world is not indicating that it’s willing to engage on the processes of these texts. It wants substantial revision but hasn’t developed any great clarity.” The EU Trade Official David O’Sullivan has also recently commented on the matter: “We can’t judge whether the US could settle tomorrow on the right terms or whether the daunting political calendar of the Obama administration inevitably means that this may be a question for 2011 instead of 2010.”

In any event, Trade Ministers agreed to hold a crucial stock-taking meeting in March 2010 in order to assess whether the 2010 target could be finally reached. As a matter of fact, if the Doha Round is not completed this year, it will be another lost year for poor countries, since the main goal of the Doha talks is to boost the world economic growth.

II. European Union: Trade

Tariff reductions granted on wide array of goods

On 8 January 2010, the EU’s Official Journal published a Council Regulation which should be of particular interest to undertakings exporting goods to the EU Member States. Council Regulation 12/2010 temporarily suspends import tariffs on a large number and broad variety of products. Suppliers to the Community market may like to acquaint themselves with the Regulation’s product list, which runs into more than 80 pages, in order to see how best they might benefit.

This latest Council Regulation temporarily suspends tariffs under framework Regulation 1255/96, which partially or totally suspended the EU's autonomous common customs tariff duties on certain industrial, agricultural and fishery products. Regulation 12/2010 states that it is in the interest of the EU to newly insert 87 products in the list of suspensions set out in the Annex to Regulation 1255/96.

Products listed in the Regulation's annex include the following:

- fishery products including types of fish roe, salmon and crabs;
- agricultural products including types of bamboo shoot, mushroom, soya protein isolate and noodles;
- hundreds of different types of chemicals, as well as dyes and film;
- leather, silk and synthetic fabric products;
- a variety of other textile products;
- ceramic and glass articles; and
- electronic components and assemblies including for plasma and LCD TVs.

Exporters should nonetheless be warned: a limited number of earlier suspensions have been withdrawn from the list because, according to Regulation 12/2010, it is no longer in the interest of the Community to maintain the suspension for those products. Furthermore, in comparison to earlier lists, this latest list has modified the description given to some products, e.g., to take account of technical product developments and market trends, while in some other cases the CN and TARIC codes have been adapted.

For ease of comprehension, and in view of the large number of products and amendments, Regulation 12/2010 now contains an entirely new list in its annex, which replaces all earlier lists. Those who feel they might benefit (or, conversely, are worried that they may no longer benefit) are advised to peruse this latest list for themselves in order, particularly, to evaluate exactly which products are newly laid out therein, and which have been taken out.

The temporary tariff suspensions have been made to apply from 1 January 2010, even though the new Regulation entered into force on the date of its publication, namely, 8 January 2010. Undertakings should take special note of the validity period for each suspension, which is laid out in the last column of the table containing the product list.

Regulation 12/2010 can be accessed via the following link:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:004:0001:0084:EN:PDF>.

III. EU Competition

A. Commission clears Oracle's acquisition of rival software company Sun

On 21 January 2010, the European Commission unconditionally cleared software company Oracle's acquisition of rival Sun Microsystems, following a phase II investigation.

Much of the Commission's scrutiny focused on whether the acquisition by Oracle of the open source database MySQL, which Sun acquired in 2008, would significantly impede effective competition on the database market in the EEA. According to the Commission, this database market is highly

concentrated, with Microsoft, IBM and Oracle making up 85% of the market. While the acquisition of MySQL would not substantially raise Oracle's share of this market (at least not if market share were measured by turnover rather than by the number of units sold), the Commission examined whether competition would nonetheless be significantly restricted if, post-transaction, MySQL no longer represented a low-cost competitive force on the market. The Commission ultimately concluded that this would not be the case, because Oracle would continue to face significant competition from other database producers.

Moreover, the Commission took account of certain voluntary commitments made by Oracle in December 2009, pledging to users of MySQL that future versions would continue to be released under open source licences and that development of the software platform would continue.

B. Commission publishes study on quantifying antitrust damages

On 19 January 2010, the European Commission published an external study prepared by the economic consultancy Oxera and a multi-jurisdictional team of lawyers on quantifying antitrust damages.

In its White Paper on damages actions for breach of antitrust rules, published in April 2008, the Commission had set out policy proposals with the aim of encouraging individuals to bring actions for damages caused by an infringement of Articles 101 and 102 TFEU (ex-Article 81 and 82 EC). In particular, the Commission announced plans to draw up a framework that would provide pragmatic, non-binding guidance for the quantification of damages in EU competition law cases for the benefit of national courts and the parties. This latest study is aimed at assisting the Commission in developing such guidance.

First, the study provides a framework for the estimation of damages. This framework draws a clear distinction between damages arising from hardcore cartels (i.e., the overcharge paid by customers, expressed as a percentage of the actual price or revenue of the cartel) and damages from exclusionary abuses of dominance (i.e., a fall in sales or lack of market access, expressed as actual losses suffered by competitors or lost profit). As regards the extent of the cartel overcharge, the study finds that the median overcharge is 18% of the cartel price but notes that in some cases (around 7% of the cartel cases) there may not be any overcharge at all.

Second, the study describes the various methods and models that can be used in quantifying damages. According to the study, these methods and models may be classified into three broad groups: comparator-based, financial-performance based, and market-structure-based. The study concludes that the choice of a method and model will depend on the details of each case, and that it may well be possible to apply more than one model. The study suggests that the court could either identify a preferred model for the case or else "pool" a selection of reasonable and robust model results to arrive at a final damages value.

IV. European Union: Regulatory

Reinforcing safety for personal data transfers to processors in third countries

On 5 February 2010, a European Commission press release announced that the Commission has adopted a Decision updating the standard contractual clauses for the transfer of personal data to processors established in non-EU countries. The Decision modifies current standard contractual

clauses to take account of the expansion of processing activities and new business models for international processing of personal data. It contains specific provision to allow, under certain conditions, the outsourcing of processing activities to sub-processors, while ensuring a constant protection of personal data.

Commission Vice-President Jacques Barrot commented that this “updated version of the standard contractual clauses [...] ensures a balance between global business needs and protection of EU citizens' personal data”.

The “controller to processor” standard contractual clauses were approved by Commission Decision 2002/16/EC, in order to provide companies with a tool which ensures adequate protection for personal data when they transfer personal data to processors outside the European Economic Area. According to the newly adopted Decision, where a data importer (processor) intends to subcontract any of its processing operations performed on behalf of the EU data exporter (controller), it must first obtain the prior written consent of the data exporter.

The written contract will impose the same obligations on the sub-processor as those imposed on the data importer under the standard contractual clauses. Where the sub-processor fails to fulfil its data protection obligations, the data importer shall remain fully liable to the data exporter for the performance of the sub-processor's obligations. Moreover the sub-processing shall only consist of the processing operations agreed in the initial contract entered into by the data EU exporter and the data importer. Existing contracts, concluded under clauses approved by Decision 2002/16/EC, shall remain in force as long as the transfers and data processing operations remain unchanged.

If the parties to the contract wish to make changes to the contract or wish to introduce sub-processing arrangements, they will be required to enter into a new contract, which shall comply with the updated version of the contractual clauses.

National Data Protection Authorities may also authorise other ad hoc contractual arrangements for international data transfers, as long as they assume that such contracts provide sufficient safeguards for the protection of the fundamental rights and freedoms and the right to privacy in particular.

Contractual clauses are not necessary for the transfer of personal data within the European Economic Area (EU plus Iceland, Norway and Liechtenstein), to those countries whose own data protection regimes have been recognised by the Commission as offering adequate protection (namely, Argentina, Switzerland, Canada, Isle of Man, Jersey and Guernsey), or to US companies adhering to the “Safe Harbor” privacy principles issued by the US Department of Commerce.

V. Dumping Watch

No developments to report.

VI. The Week Ahead

A. Parliament

- 8-11 February 2010: European Parliament plenary session

B. WTO

- 8 February 2010: UNCTAD Trade and Environment Review 2009/2010 – Geneva
- 8 February 2010: WIPO Symposium on the Evolution of the Regulatory Framework of Test Data – From the Property of the Intellect to the Intellect of Property – Geneva
- 10-12 February 2010: Trade Policy Review Body – El Salvador

C. OECD

- 8-9 February 2010: Economic Crisis, Rising Unemployment and Policy Responses: What Does It Mean for Income Distribution?, workshop organised by IZA and the Directorate for Employment, Labour and Social Affairs.
- 9 February 2010: Les Ateliers de l'OCDE, media briefing in French, to launch a chapter on social mobility, from the publication Going for Growth, presented by Romain Duval and Orsetta Causa, OECD Economics Department. Organised by the OECD and the AJEF as part of a monthly series.
- 9 February 2010: OECD statistics news releases: Harmonised Unemployment Rates.
- 10-12 February 2010: Be Smart, Be Sustainable: Restructuring the City of Tomorrow, Eurocities Forums on Environment and Economic Development, with participation of the OECD. Madrid, Spain.
- 11-12 February 2010: OECD network of parliamentary budget officials meet. Bern, Switzerland.

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