

BRUSSELS MONITOR

A Weekly Review of EU Trade Policy Developments Affecting Japan

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I. WTO Watch

WTO backs US, Japan and Taiwan in trade dispute over EU's high-tech tariffs

On 14 June 2010, a US official reported that, in an interim ruling of 11 June 2010, a WTO dispute panel has backed the US and Taiwan in their complaint aimed at overturning controversial EU tariffs on three electronic products. The US official, who preferred to remain anonymous owing to the confidential nature of the WTO's interim ruling, declared as follows: "I can confirm that the panel agreed with the US, Japan and Taiwan on essentially all of our claims."

The US, Japan and Taiwan lodged a complaint at the WTO in July 2008 alleging that the EU had violated its commitments under the WTO Information Technology Agreement ("ITA") by maintaining tariffs on flat-panel displays, TV set-top boxes with communication functions and multifunctional printers that can fax, scan and/or copy documents. Although the ITA requires participating countries to eliminate import tariffs on some 180 information technology goods (including, e.g., semiconductors, computers and telecommunication equipment), the EU nevertheless continued to impose a 13.9% import tariff on set-top boxes, a 14% tariff on flat-panel displays and a 6% tariff on multifunctional printers.

For its part, the EU argued that technical innovation had resulted in substantive changes to the products subject to the WTO complaint and that these products were no longer covered by the ITA "because they are objectively different from the specific goods listed for coverage under the agreement". For example, flat panel computer displays are now capable of being used as TV monitors, which do not fall within the scope of the ITA. In response, the US claimed that if the EU's arguments were accepted, no product on today's market would be covered by the ITA. According to the US, "products have improved over time, incorporated advanced features or improved technologies, yet they still fall within the ordinary meaning of the original concessions". For instance, the US considers that the ITA covers any input/output unit of a computer, meaning any device that connects to the computer.

Commenting on the WTO's interim ruling, the Vice-President for Global Policy at the US-based Information Technology Industry Council, John Neuffer, declared that if reports of a victory of the US, Japan and Taiwan were accurate, "this would be an important pro-innovation, pro-growth, pro-jobs result". He added that the panel's decision would impact not only exporters in the complaining countries but also exporters all over the world. Therefore, Neuffer urged the EU "to quickly renounce its past flawed interpretations of the ITA, eliminate duties on the products at the issue in the dispute, and implement the ITA as it should be implemented – to spur growth and innovation globally".

In response, the European Commission's spokesman John Clancy stated that the Commission was studying the report and that "it is a technical, complex issue". The WTO panel is due to issue its final ruling by 23 July 2010, with public release of the decision following in September 2010. Historically, WTO panels rarely reverse their initial interim findings in their final ruling.

II. European Union: Trade

Consumer groups advocate more stringent requirements in industry-driven ecodesign Voluntary Agreements

In a joint report dated 19 May 2010, two of the EU's leading consumer organisations, BEUC and ANEC, heavily criticised the use of Voluntary Agreements under the ecodesign Directive. Businesses may recall a Directive adopted in October last year, Directive 2009/125/EC, which established a framework for the setting of ecodesign requirements for energy-related products so as to make them more environmentally friendly. This 2009 Directive repealed and replaced an earlier, 2005 framework Directive, which covered the ecodesign of energy-using products. By switching from energy-using to energy-related products, the scope of the new Directive is intended to become much broader than was previously the case.

The framework Directive has so far led to several binding implementing measures covering a wide range of energy-using equipment, with which electrical appliance businesses exporting to the EU will have become familiar. Among others, these binding measures cover energy-using products such as televisions, office and domestic lighting, stand-by functions in electronic goods and refrigerators.

The ecodesign Directive also allows for industries in particular sectors to develop self-regulation measures known as Voluntary Agreements (VAs). These can be used to fulfil producers' ecodesign obligations once the VAs are endorsed by the Commission.

An example of such a VA (which is not yet in force) with which businesses may have become familiar is in the imaging equipment sector. In this sector, which covers copiers, faxes, printers, scanners and multifunctional devices, major manufacturer-suppliers such as Canon, Dell, HP, Brother, Toshiba, Panasonic, Xerox, Samsung, Sharp, Fujitsu and Kodak, collectively drafted a Voluntary Agreement.

The two consumer groups critiqued many aspects of VAs under the ecodesign Directive, which could lead the Commission to seriously reconsider how these Agreements are framed:

- Preparatory study prior to endorsement of a VA: The groups argued that the Commission should require industry to use a common methodology to carry out preparatory work prior to proposing a new VA. This can then ensure that stakeholders will have relevant information to evaluate the merits and ambitions of the proposed VA.
- Impact assessment of VAs should be mandatory: The groups proposed that the Commission should carry out an assessment with measurable indicators to test the effectiveness of VAs. In particular, VAs should be evaluated across three "crucial" factors: environmental improvement, timing, and costs.
- Industry should not unilaterally determine the content of VAs: The consumer groups argued that industry *alone* should not determine the scope and content of VAs that are intended to fulfil their ecodesign Directive obligations. Rather, the groups suggested that the Commission set minimum requirements for all VAs, and proposed a system of co-regulation by the particular industry, the Commission and Member States, rather than self-regulation by the industry alone.
- Greater market coverage: The groups further wanted the Commission to require greater market coverage prior to endorsing a VA. At present, a VA must address a minimum of 70% of products placed on the market, and the consumer groups suggested that 80% coverage would be more appropriate. They also called upon the Commission to require at least 90% of economic operators to commit themselves to the VA. They noted that without greater market coverage, a large portion of products offered to consumers would still remain energy-inefficient.

- Basic elements so as to increase credibility: The groups advocated for some basic elements to be required of all VAs in order to guarantee a minimum basis of credibility. They cited provisions for an independent audit and sanctions, including the naming-and-shaming of non-compliant companies, the expulsion of non-compliant signatories from the scheme, and fines, as minimum requirements.
- Criteria for Failure of VAs: The groups wanted the Commission to develop criteria for assessing the failure of VAs. They proposed that signs of a “failing VA” would, at a minimum, include: interim targets that have not been achieved, progress that cannot be assessed due to insufficient or non-transparent monitoring, no initiative taken by manufacturers to develop the VA further after the last stage of objectives has been put into practice, several signatories unilaterally withdrawing from a VA, and a VA that ceases to exist.

If the Commission chooses to revise its procedures to address these concerns, it will be more difficult for businesses to develop VAs that will be endorsed by the Commission, and more likely that businesses will face more frequent and thorough enforcement efforts when a VA is in place.

Businesses interested in reading the full report by BEUC and ANEC can access it via the following link: <http://www.anec.eu/attachments/ANEC-PT-2010-EuP-021final.pdf>.

III. EU Competition

French local authority seeks damages for Commission’s failure to impose conditions in its clearance of *Blackstone/Acetex* merger

On 5 June 2010, details were published in the Official Journal of a damages action brought before the General Court by Communauté des communes de Lacq (a French local authority) against the European Commission, requesting compensation for injury allegedly suffered by the local authority following the Commission’s unconditional clearance of the *Blackstone/Acetex* transaction.

The *Blackstone/Acetex* case concerned the acquisition of acetyls and plastics producer Acetex by global chemicals company Celanese, which is controlled by private equity firm Blackstone. Following an in-depth investigation, the Commission cleared this transaction without conditions on 13 July 2005, finding that the merged entity would continue to face competition from a number of actual and potential competitors. In July 2009, Celanese announced the closure of the Acetex plant in Pardies (a town in the communes de Lacq region in France), which would result in 350 employees at the plant losing their jobs.

Communauté des communes de Lacq is now seeking €10 million in damages from the EU because the Commission cleared the *Blackstone/Acetex* transaction without making the clearance conditional upon Celanese’s alleged commitment to continue the operation of the Acetex factory in Pardies for five years. The applicant argues that, by failing to make this commitment a condition to the Commission’s approval decision, the Commission “deprived all third parties to concentrations (employees and local officials) of protection”. Communauté des communes de Lacq also claims that the Commission’s failure to impose this condition caused it significant damage since “local authorities in that area [i.e., around Pardies] are deprived of important fiscal resources and have to pay out numerous social benefits because of the closure of this site. Numerous redundancies must be

expected, both among employees of Acetex and also among employees of companies whose activities were closely linked to that of Celanese Corporation”.

The damages proceedings are currently pending before the General Court. There is precedent of compensation being awarded for errors committed by the Commission in merger control proceedings, albeit in a case where a would-be merging party sued based on the Commission’s prohibition of its merger. Indeed, in the European Court of Justice’s *Schneider* judgment, the EU was ordered to partially compensate Schneider for certain damages incurred as a result of errors committed by the Commission in prohibiting Schneider’s acquisition of Legrand.

IV. European Union: Regulatory

New joint enforcement report reveals that a quarter of companies violate REACH obligations

Businesses may face more compliance monitoring of their REACH obligations in the EU as enforcement authorities step up efforts to systematically identify violations. The EU’s Forum for Exchange of Information on Enforcement presented a fact report on 18 May 2010, detailing the inspection findings in 25 States of the European Economic Area (23 of the 27 EU countries plus Norway and Iceland). The report related to compliance with the Registration, Evaluation and Authorisation of Chemicals Regulation (commonly known, simply, as just “REACH”).

The REACH regulation, which entered into force on 1 June 2007, requires that EU manufacturers and importers of chemicals, preparations and certain articles that contain chemicals ensure that the chemicals are safe when placed on the EU market. Importers are required to gather comprehensive information on the properties of the products and preparations they import, and are further required to report this information in a registration dossier to the European Chemicals Agency (ECHA). If they fail to register by the deadlines set down in the Regulation, their substances, preparations or products cannot be marketed in the EU.

The first registration deadline is only months away: 30 November, 2010. However, a few companies have decided to beat the deadline and have already registered.

Between May and December 2009, 1,600 inspections were carried out on 878 manufacturers, 666 importers, 83 “only representatives”, and 858 downstream users (businesses will be aware that “only representatives” are appointed by non-EU manufacturers to represent them for registration and other purposes in the EU).

The inspections focused on two issues: first, verifying that pre-registration obligations (and registration obligations where relevant) had been fulfilled, and second, verifying that specific requirements for safety data sheets (SDS) had been met. SDS’s contain the main source of safety information from manufacturers/importers to downstream users.

Overall, the inspections revealed non-compliance with REACH obligations at an alarming rate, i.e., in 24% of companies.

- With regard to registration obligations, 119 companies were not in compliance for certain substances manufactured or imported. In 38 companies, a number of substances were neither pre-registered nor registered, and in 81 companies, the content of the pre-registration was incorrect.

- With regard to SDS obligations, 84 companies did not have the required SDS's available, and they were only partially available in 93 companies. This corresponds to 1,446 substances in which SDS's were required but not available out of a total of 5,137.
- There were a variety of enforcement measures taken against these breaches, such as the blaming-and-shaming of companies, administrative orders, fines and criminal complaints.

Businesses will need to ensure that they closely adhere to the REACH obligations as Member States' enforcement authorities continue to beef up their capacity throughout Europe, and undertake more regular EU-wide enforcement efforts.

More detail on the report can be accessed at:

http://echa.europa.eu/doc/about/organisation/forum/ref_1_facts_report.pdf.

V. *Dumping Watch*

Notice of initiation of anti-dumping proceeding - ceramic tiles

On 21 June 2010, the Official Journal published a notice of initiation of an anti-dumping proceeding concerning imports of ceramic tiles originating in the People's Republic of China ("PRC").

The product concerned is glazed and unglazed ceramic flags and paving, hearth or wall tiles; glazed and unglazed ceramic mosaic cubes and the like, whether or not on a backing, currently falling within CN codes 6907 10 00, 6907 90 10, 6907 90 91, 6907 90 93, 6907 90 99, 6908 10 10, 6908 10 90, 6908 90 11, 6908 90 21, 6908 90 29, 6908 90 31, 6908 90 51, 6908 90 91, 6908 90 93, 6908 90 99.

It is recalled that the Commission received a complaint lodged on 7 May 2010 by the European Ceramic Tile Manufacturers' Federation ("CET") on behalf of producers representing a major proportion, in this case more than 30%, of the total Union production of ceramic tiles. According to the Commission, the *prima facie* evidence provided by CET showed that the volume and the prices of the imported product concerned have had a negative impact on the quantities sold and the market share held by the Union industry, resulting in substantial adverse effects on the overall performance of the Union industry.

Therefore, the Commission has decided to initiate an investigation. In order to enable the Commission to decide whether sampling is necessary and, if so, to select a sample, all exporting producers, all unrelated importers and all Union producers are requested to make themselves known to the Commission within 15 days of the date of publication of the notice in the Official Journal.

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

VI. *The Week Ahead*

A. **Council**

- 28-29 June 2010: Agriculture and Fisheries Council (Luxembourg)

B. OECD

- 28 June 2010: Improving Productivity in Lagging Regions, workshop organised by the Directorate for Public Governance and Territorial Development.
- 28-29 June 2010: Strategic Investment Planning for Educational Facilities, workshop organised by the OECD Directorate for Education and the European Investment Bank. Luxembourg.
- 28-29 June 2010: Environmental Biotechnology Research and Development workshop, organised by the Directorate for Science, Technology and Industry.
- 29 June 2010: Development of Strategies for Measuring and Reporting Sustainability of Bio-based Energy and Products, workshop/OECD discussion panel organised by the Directorate for Science, Technology, and Industry. Washington DC, USA.
- 29 June 2010: Exposure Measurement and Exposure Mitigation Concerning Manufactured Nanomaterials, organised by the Environment Directorate. Karlsruhe, Germany.
- 30 June – 1 July 2010: Corporate Responsibility: Updating the Guidelines for Multinational Enterprises, roundtable focusing on supply chains, human rights and environment and climate change, organised by the Directorate for Financial and Enterprise Affairs. This event is open to the media under Chatham House rules.
- 3-5 July 2010: Implementation of National Strategies in Fighting Against Corruption, meeting of the Arab Administrative Development Organization, jointly organised with the MENA-OECD Governance Initiative. Cairo, Egypt.

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