

BRUSSELS MONITOR

A Weekly Review of EU Trade Policy Developments Affecting Japan

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I. WTO Watch

China's restrictions on exports of rare earth elements may result in WTO proceedings

On 22 June 2010, US industry representatives, who wished to remain anonymous, claimed that China's restrictions on exports of rare earth elements used in the manufacture of cell phones and radars "are being targeted by the US Representative for a potential case". Business groups and unions have confirmed that US trade officials have asked them to provide evidence that China is hoarding these raw materials on the domestic market.

China is said to control 97% of the global production of rare earth elements and thus hold market power over economies such as the US and the EU. Rare earths are a group of 17 chemically similar metallic elements, including lanthanum, cerium, neodymium and europium, which are used in high-power magnets, mini-hard-drives in laptop computers, radars, catalytic converters for vehicles, electric car batteries and wind turbines. China has been dominant on the market of rare earth elements since the mid-1980s, due to its low labour and regulatory costs.

At present, China restricts exports of the rare earth elements through quotas and export taxes as high as 25%. According to the US trade office, "the export restraints can artificially lower China's domestic prices for the raw materials due to the significant domestic oversupply". The EU has expressed its own concerns about China's export restriction of rare earths. In a report released in June 2010, the European Commission stated that European companies could face severe shortages of raw materials that are crucial to a wide range of technologies.

The EU affirmed that supplies of raw materials such as rare earth metals are increasingly under pressure, "as rising global demand encourages producer countries, such as China, to cut back on the quantities of raw materials they export". Indeed, the European Commission's Vice-President in charge of Industry and Entrepreneurship has declared the following: "It is our aim to make sure that Europe's industry will be able to continue to play a leading role in new technologies and innovation and we have to ensure that we have necessary elements to do so."

In response to the foregoing, the Director of Chinese Society of Rare Earths, Liu Aisheng, affirmed that "China restricts the mining and export of rare earths to protect the environment and minimise pollution". He added that it was "pointless for the US government to complain to the WTO about China's restrictions, as Chinese policy is unlikely to lead to severe supply shortages given that China will continue to export and other countries will also catch up in production as long as there is demand". According to Mr Liu, "China's rare earths deposits are big, but it is not the only country that has deposits. Gradually, supply and demand will reach a new equilibrium".

Finally, it should be noted that the US and the EU have already filed a joint complaint to the WTO against Chinese curbs on the exports of raw materials such as magnesium, coke and zinc used in making steel and other products.

II. European Union: Trade

Commission launches "CE marking" informational campaign

Businesses the world over that export to the EU may find themselves more vigilantly applying the CE marking to their products as a result of the Commission's campaign to promote the proper use of

the mark. In mid-June 2010, the European Commission launched an informational campaign regarding the CE marking, with the goal of promoting a better understanding of the mark's purpose and use amongst economic operators.

The CE marking is a visible symbol affixed to certain types of product indicating that the product's manufacturer has taken the steps necessary to ensure that the product complies with all EU legislative requirements (including, for example, health, safety and environmental requirements). The marking must be placed on products put on the market if the product falls within one of twenty-four different categories, including toys, electronic goods and machinery.

For products that are imported into the EU from a third country, the product's importer is responsible for verifying that his non-EU manufacturer has undertaken the necessary steps (conducting a conformity assessment, establishing a technical file and affixing the CE marking) to ensure compliance, and that any required documentation is available upon request.

The CE marking will also play a crucial role within the 2010 New Legislative Framework for the EU internal market for goods, which provides for the control of testing laboratories and certification bodies and establishes an EU surveillance policy for products on the market and products from third countries. These efforts to enhance the control of testing and certification procedures and improve market surveillance are aimed at bolstering the reputation of the CE marking and increasing consumers' trust in the symbol.

The Commission's new informational campaign consists of, among other initiatives, 30 CE marking educational events/seminars for economic operators, professional associations, consumer associations and journalists. It is hoped that such seminars will help improve the use of the CE marking on products manufactured within the EU and imported from third countries.

For more information, businesses may like to see the following press release:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/733&format=HTML&aged=0&language=EN&guiLanguage=en>.

For more information on the CE marking in general, see:

<http://ec.europa.eu/enterprise/policies/single-market-goods/cemarking/>.

III. EU Competition

General Court reduces fine on AstraZeneca for misuse of patent system

In a judgment rendered on 2 July 2010, the EU General Court largely upheld the European Commission's findings concerning an alleged abuse of dominance by AstraZeneca in the proton pump inhibitor ("PPI") market, but reduced the fine imposed on AstraZeneca from €60 million to €2.5 million.

In June 2005, the Commission found that between 1993 and 2000, AstraZeneca had abused its dominant position on the PPI market by blocking or delaying market entry for generic versions of its ulcer drug Losec. In its decision, the Commission considered that AstraZeneca had abused its dominant position in two ways. First, AstraZeneca had provided several national patent offices in Europe with misleading information concerning the date on which it received its first marketing authorisation for Losec, thereby illegitimately obtaining extended patent protection for Losec. Second, the Commission found that AstraZeneca further abused its dominant position by deregistering Losec

capsule marketing authorisations in some Member States, which had the effect of delaying the market entry of generic competitors. AstraZeneca subsequently lodged an appeal against the Commission's decision.

In its judgment, the General Court has rejected AstraZeneca's arguments that it made a good faith error concerning the dates it provided to patent offices in Europe. Moreover, regarding the deregistration of the Losec capsule marketing authorisations, the General Court has agreed with the Commission that AstraZeneca's conduct did have as its object to delay the market entry of potential generic competitors. The General Court also rejected AstraZeneca's arguments that generic producers could have circumvented AstraZeneca's barriers to market entry, noting that the existence of an alternative route to the market does not remove the abusive nature of the conduct of an undertaking in a dominant position where that conduct, considered objectively, has the sole object of making entry more difficult and costly.

Notwithstanding the foregoing, the General Court agreed with the applicant that the Commission had failed to prove that the deregistration of the marketing authorisations was capable of preventing parallel imports of Losec in two Member States. As regards Denmark, the General Court found that the Commission had not established that the Danish authorities were likely to withdraw the parallel import licences following AstraZeneca's deregistration of its marketing authorisations, nor that the Danish authorities had indeed revoked the parallel import licences for Losec capsules in violation of the EU rules on the free movement of goods. As regards Norway, the General Court observed that the fact that the Norwegian authority upheld the parallel import licences for Losec capsules tended to show that the fall in parallel imports in Norway was not necessarily caused by the deregistration of the marketing authorisations. Accordingly, the General Court reduced the fine imposed on AstraZeneca from €60 million to €52.5 million.

IV. European Union: Regulatory

EU publishes two Directives to increase use of energy-efficient products

Suppliers of energy-using and energy-related products should take note of two recently-published recast Directives.

Firstly, on 18 June 2010, the Official Journal published a recast version of Directive 2010/30/EU on product labelling and standard information requirements for energy-related products (the "Energy Labelling Directive"). The original version of the Energy Labelling Directive, in force since 1992, harmonised EU Member States' laws relating to the required label information concerning energy and water consumption by household appliances. The Directive's intent was to provide consumers with relevant information to choose appliances on the basis of their energy and resource efficiency.

The new recast Directive extends the scope of the Energy Labelling Directive significantly by including "energy-related" products, in addition to "energy-using" products and by including products intended to be used in a "commercial and industrial setting" in addition to household appliances. Thus, the Directive now requires that suppliers of both energy-using and energy-related products for the home, business and industry affix labels to their goods with specific information on the consumption of energy and other related resources resulting from their use.

Additionally, the labelling scale employed by the original Directive, with efficiency ratings ranging from A to G, will be modified by the addition of the new classes A+, A++ and A+++ above class A.

Businesses exporting appliances to the EU, including, for example, washing machines, other kitchen appliances, as well as office products (e.g., photocopying machines), will be required to:

- Produce technical documentation sufficient to ensure the accuracy of the information contained in product labels and keep such documentation on hand for inspection for five years;
- Provide a label to be attached to the product by the dealer;
- Provide a product “fiche”, or information card, contained in all the brochures and literature relating to the product.

It should finally be noted that the exact definition of the type of products to be included in the framework of the Energy labelling Directive will be provided in so-called “delegated acts”. Which the Commission will adopt. Businesses should therefore be sure to track both national legislation implementing the Directive described above (over the next year) as well as any delegated acts which will be adopted and published by the European Commission.

Secondly, a recast version of Directive 2010/31/EU on the Energy Performance of Buildings was also published in the Official Journal on 18 June 2010. Exporters to the EU of building appliances (e.g., air conditioning or heating systems) and materials used in the construction and furnishing of buildings in the EU will need to take heed of the product and information requirements demanded of their buyers under this newly adopted Directive.

The recast of the Directive was aimed at strengthening the energy performance requirements imposed on products within the Directive’s scope, and on streamlining some of the Directive provisions.

A few notable changes in the recast version of the Directive include an expansion of the Directive’s scope and the establishment of more demanding building energy performance requirements. In particular, the Directive’s energy performance requirements will now apply to refurbishment projects for buildings of any size, rather than only for buildings greater than 1000 square metres as under the original Directive.

Moreover, the recast Directive also establishes the goal that all new buildings (both commercial and residential) should be “nearly-zero energy” buildings by 2020. For all new Public sector buildings, the deadline for reaching “nearly-zero energy” status is 2018.

As a result of these ambitious targets, suppliers of energy-efficient building materials and appliances may expect to see growth in demand for their products in Europe.

A copy of Directive 2010/30/EU may be found at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:153:0001:0012:EN:PDF>.

A copy of Directive 2010/31/EU may be found at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:153:0013:0035:EN:PDF>.

V. *Dumping Watch*

A. **Notice of initiation of a safeguard investigation - wireless wide area networking modems**

On 30 June 2010, the Official Journal published a notice of initiation of a safeguard investigation concerning imports of wireless wide area networking (“WWAN”) modems.

The product concerned is WWAN modems with a radio antenna and providing Internet Protocol data connectivity for computing devices and including Wi-Fi routers comprising a WWAN modem (WWAN/Wi-Fi routers) currently falling within CN codes ex 8517 62 00 and ex 8471 80 00.

It is recalled that the Commission received a request from the Belgian Government alleging that imports into the Union of the product concerned have been increasing rapidly both in absolute terms and relative to Union production and consumption. Therefore the Commission has opened an investigation that will determine whether, as a result of unforeseen developments, the product concerned is imported into the Union in such greatly increased quantities and/or on such terms or conditions as to cause or threaten to cause serious injury to the Union producers.

The Commission will send questionnaires to known producers of like or directly competitive products in the Union and to known exporters/producers and importers of the product concerned. All interested parties must make themselves known by contacting the Commission, presenting their views and submitting questionnaire replies or any other information within 21 days of the date of publication of the notice in the Official Journal. All interested parties may also apply to be heard by the Commission within 21 days of the publication of the notice in the Official Journal.

The investigation shall, if possible, be concluded within nine months of the date of the publication of the notice in the Official Journal. In exceptional circumstances the investigation may be extended by a further maximum period of two months.

B. Notice of initiation of an anti-dumping proceeding - wireless wide area networking modems

On 30 June 2010, the Official Journal published a notice of initiation of an anti-dumping proceeding concerning imports of wireless wide area networking (WWAN) modems originating in the People's Republic of China.

The product concerned is WWAN modems with a radio antenna and providing Internet Protocol data connectivity for computing devices and including Wi-Fi routers comprising a WWAN modem (WWAN/Wi-Fi routers) currently falling within CN codes ex 8517 62 00 and ex 8471 80 00.

It is recalled that the complaint was lodged on 3 June 2010 by Option NV, the sole producer of WWAN modems in the EU. According to the Commission, 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 the prices charged and the market share held by the Union industry, resulting in substantial adverse effects on the overall performance, the financial situation and the employment situation of the Union industry.

Therefore the Commission has opened 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 Union producers must contact the Commission no later than 15 days after the publication of the notice in the Official Journal. Parties that make themselves known may provide the Commission with information on whether the imposition of measures would not be against Union interest within 37 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.

C. Amendment of definitive countervailing duty - polyethylene terephthalate film

On 2 July 2010, the Official Journal published Council Implementing Regulation 579/2010 amending Regulation 367/2006 imposing a definitive countervailing duty on imports of polyethylene terephthalate (PET) film originating in India.

The product concerned is PET film falling within CN codes ex 3920 62 19 and ex 3920 62 90.

It is recalled that in December 1999, by Regulation 2597/1999, the Council imposed a definitive countervailing duty on imports of the product concerned originating in India. A request for a partial interim review was lodged by Jindal Poly Films Limited, an exporting producer from India. The request was limited in scope to the examination of subsidisation as far as the applicant is concerned. According to the Commission, the applicant 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 a lasting nature.

The investigation of the level of subsidisation covered the period from 1 April 2008 to 31 March 2009. The Commission found that the applicant is in receipt of much lesser subsidisation than before and that it is likely to continue to receive subsidies of an amount which is less than determined in the previous investigation. The Council has therefore decided that the level of the measure should be amended to reflect the new findings.

Thus, the rate of the definitive countervailing duty applicable to the net free-at-Union-frontier price, before duty, is 7.2% for Ester Industries Limited, 5.4% for Garware Polyester Limited, 8.4% for Jindal Poly Films Limited, 8.7% for MTZ Polyfilms Limited, 8.6% for Polyplex Corporation Limited, 5.4% for SRF Limited, 6.4% for Uflex Limited and 19.1% for all other companies.

Council Implementing Regulation 579/2010 entered into force on 3 July 2010.

D. Amendment of definitive anti-dumping duty - ironing boards

On 2 July 2010, the Official Journal published Council Implementing Regulation 580/2010 amending Regulation 452/2007 imposing a definitive anti-dumping duty on imports of ironing boards originating, *inter alia*, in Ukraine.

The product concerned is ironing boards, whether or not free-standing, with or without a steam soaking and/or heating top and/or blowing 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.

It is to be recalled that the Council, by Regulation 452/2007, imposed a definitive anti-dumping duty on imports of ironing boards originating, *inter alia*, in Ukraine. In August 2008, the Commission received a request for a partial interim review, limited in scope to the examination of dumping, lodged by an exporting producer from Ukraine, Eurogold Industries Ltd (“EGI”). According to the

Commission, the applicant provided *prima facie* evidence that the continued imposition of the measure at its current level was no longer necessary to offset dumping.

The investigation covered the period from 1 January 2008 to 31 December 2008. The Commission concluded that the changed circumstances were of a lasting nature as the structural reorganisation of the sales channels of the applicant and its related company were now well established for the majority of its sales and could be considered long-lasting.

Following its investigation, the Commission decided that the dumping margin for EGI, expressed as a percentage of the net, free-at-Union-frontier price, duty unpaid, is 7%. Since the methodology used to determine the dumping margin for EGI was used to establish the dumping margin for any other Ukrainian exporting producers of the product concerned, the Council has decided that the duty of 7% should apply to all Ukrainian companies.

Council Implementing Regulation 580/2010 entered into force on 3 July 2010.

VI. *The Week Ahead*

A. Council

- 5-6 July 2010: Informal Health Council (Brussels)
- 7 July 2010: Informal Development Cooperation Council (Brussels)

B. Parliament

- 5-8 July 2010: European Parliament plenary session (Strasbourg)

C. WTO

- 5-7 July 2010: Trade Policy Review Body — Chinese Taipei

D. OECD

- 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.
- 7 July 2010: Publication of Employment Outlook, news conference.
- 7-9 July 2010: Manufactured Nanomaterials, working party meets.
- 8 July 2010: Rethinking the Present to Shape the Future: Choosing Sustainability, meeting organised by UniCredit Group, with participation of Deputy Secretary-General Pier Carlo Padoan. Rome, Italy.
- 9 July 2010: OECD statistics news releases: Composite Leading Indicators.

- 9-10 July 2010: Opportunities and Challenges in the Emerging Field of Synthetic Biology, symposium organised by the Directorate for Science, Technology and Industry, the US National Academies of Science and the UK Royal Society. Washington, DC, US.
- 11-15 July 2010: Transport Research Society, World Conference with participation of the OECD International Transport Forum. Lisbon, Portugal.

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