

# BRUSSELS MONITOR

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*A Weekly Review of EU Trade Policy Developments Affecting Japan*

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## ***I. WTO Watch***

### **WTO panel rules that Airbus benefited from illegal EU subsidies**

According to a WTO panel report made public on 30 June 2010, governments of certain EU Member States awarded aircraft manufacturer Airbus illegal subsidies to help it in its battle with US competitor Boeing. The findings of the WTO report indicate that, had Airbus successfully entered the large civil aircraft industry without the subsidies, it would have been a “much different, and we [the WTO panel] believe, a much weaker” light civil aircraft manufacturer with “at best” a more limited offering of models.

The EU and the US have been locked in a dispute over state aid to large commercial aircraft builders Airbus and Boeing for several years. In 2004, Boeing filed a complaint at the WTO alleging that the EU and its Member States were illegally subsidising Airbus. A WTO panel was established in July 2005 after the EU and the US failed to reach a compromise in their dispute. The EU in turn filed a counter-complaint at the WTO claiming that the US had granted illegal subsidies to Boeing, mainly in the form of research and development contracts provided by the National Aeronautic and Space Administration and the US Department of Defence.

So-called “launch aid” was the main focus of the US complaint against the EU, which took the form of long-term unsecured loans at zero or below-market interest rates with back-loaded repayment schedules, allowing Airbus to repay the loans through a levy on each delivery of the financed aircraft. If Airbus failed to sell enough the aircraft to repay the loan, the outstanding balances were indefinitely extended or forgiven.

The WTO panel has now found that the launch aid loans resulted in a decrease in the number of imports of Boeing aircraft into the EU and certain third-countries markets, including Brazil, China, South Korea and India. Moreover, according to the panel, the launch aid loans provided by Germany, Spain and the UK for the A380 were contingent upon export performance and were therefore prohibited under the WTO rules.

Following the publication of the report, US Trade Representative Ron Kirk described the WTO’s ruling as an “important victory [that] will benefit American aerospace workers, who have had to endure watching Airbus receive these massive subsidies for more than 40 years”. According to Mr Kirk, “these subsidies have greatly harmed the United States, including causing Boeing to lose sales and market share.”

At the same time, however, the WTO panel noted that support to Airbus had not affected jobs or profits in the American aircraft sector. As a result, the EU has decided to appeal the WTO decision. EU Trade Commissioner Karel De Gucht declared on 3 July 2010 that “the panel’s findings on the economic effects of Airbus’ funding on the US aircraft industry are limited”. He added that “this final report needs to be read together with the forthcoming interim report on subsidies provided by the US Boeing. Only then will we [both parties to the dispute] have a fuller and more balanced picture of this dispute”. The WTO decision in the Boeing case is expected to be made public during the coming weeks.

## ***II. European Union: Trade***

### **New EU investment package aims to boost trade and underpin investor rights**

On 7 July 2010, the European Commission published two initiatives concerning foreign direct investment (“FDI”), comprising a policy paper that discusses how the new EU competence on FDI should be used to boost competitiveness and also draft legislation designed to manage the transition towards a comprehensive EU investment policy.

Before the entry into force of the Lisbon Treaty on 1 December 2009, FDI was a policy field with a specific division of work between the EU and its Member States. Their roles in shaping investment policies were complementary: whilst the EU pursued the liberalisation of FDI, in particular through its trade agreements with foreign countries, the Member States sought protection of investment flows, by concluding Bilateral Investment Treaties (BITs). BITs establish the terms and conditions for investment by nationals and companies of one country in another and set up a legally binding level of protection in order to encourage investment flows between two countries. EU Member States are the main users of BITs globally, with a total number of about 1200 bilateral treaties already concluded.

From 1 December 2009, the Lisbon Treaty brought investment policy within the sphere of policy areas developed at the European level and the new investment package published by the Commission is intended to represent a first step towards a comprehensive European international investment policy. The policy paper, which is entitled “Towards a comprehensive European international investment policy”, explores the ways in which investment policy can contribute to growth. For its part, the draft legislation proposed by the Commission provides for a transitional mechanism that aims to empower Member States to enter into bilateral negotiations with non-EU countries. This is mainly due to the fact that existing BITs maintained by Member States may require amendments in order to bring them in compliance with EU law.

EU Trade Commissioner Karel De Gucht considers that the investment package will strengthen the EU’s ability “to ensure level playing fields”, and “will keep Europe as the world’s number one player in the field of foreign direct investment, ensure the best deal for all European businesses, invigorate growth and create jobs at this crucial time”.

### ***III. EU Competition***

#### **EU issues fines in pre-stressing steel case**

On 30 June 2010, the European Commission issued a decision finding that 17 steel companies had infringed Article 101 of the Treaty on the Functioning of the EU (“TFEU”) by participating in a cartel in the pre-stressing steel market for nearly 18 years. The 17 companies were fined a total of €18 million, with ArcelorMittal, the world’s largest steel producer, receiving the largest fine of €276 million despite being awarded a 20% reduction for cooperating with the investigation.

According to the Commission’s decision, the cartel operated between 1984 and 2002 in all of the Member States which were then part of the EU, excluding Greece, Ireland and the UK. The Commission found that the companies had engage in price fixing, market sharing, the exchange of sensitive business information, and other bilateral agreements in the pre-stressing steel market.

The cartel concerned the market for pre-stressing steel, which is a type of long, curled steel wire used to reinforce concrete in residential and commercial construction. In issuing the decision, EU Competition Commissioner Almunia noted that “[i]t is amazing how such a significant number of companies abused nearly the entire European construction market for such a long time and for such a

vital product". The total amount of fines imposed on the companies was substantial despite the fact one company, DWK/Saarstahl, received immunity for bringing the cartel to the Commission's attention, while six other undertakings received varying levels of reduction in their respective fines for cooperating with the Commission under the latter's leniency programme.

In addition to the reductions for leniency, three companies were granted reductions on the basis of their inability to pay. In the current economic climate, with many companies suffering financially, there have been many applications for such reductions, although the Commission continues to view such petitions with suspicion. Indeed, although three companies in the pre-stressing cartel received reductions in their respective fines based on their inability to pay, 10 other cartel members that had also sought a reduction on the grounds of their inability to pay had their applications rejected by the Commission.

The Commission has indicated that inability to pay claims will be taken seriously due to the current economic climate, but that reductions in the levels of fines should continue to be the exception rather than the rule. According to the Commission, a reduction will only be granted where the imposition of a larger fine would push a company into liquidation. A company which might be pushed into a reorganisation procedure or which would be forced to put itself up for sale as a going concern would not, on the other hand, be eligible for a reduction.

Finally, it should be noted that, in addition to the various reductions in the levels of the fines imposed, the Commission at the same time increased the fines imposed on ArcelorMittal Fontaine and ArcelorMittal Wire France by 60% on account of recidivism. Both of these companies had previously been found to have engaged in cartels in the EU.

Should the addressees of the Commission's decision wish to bring an appeal, this must be lodged at the General Court of the EU within two months and 10 days of being notified of the decision. If an addressee does not lodge an appeal within that time, the decision will become final vis-à-vis that company.

#### ***IV. European Union: Regulatory***

##### **European parliamentary committee votes for more ambitious WEEE law**

On 23 June 2010, members of the European Parliament's Committee on Environment, Public Health and Food Safety (the ENVI Committee) voted to adopt the draft report by rapporteur Karl Heinz Florenz on a proposed update to legislation on waste electronic and electrical equipment (the WEEE Directive). The vote signals the next step in the legislative process. After this, the European Parliament as a whole will have to vote on the report, bringing it one step closer to adoption as the recast (i.e., revised, with tougher provisions) WEEE Directive.

The Committee vote favoured tougher recovery, recycling and reuse targets for WEEE; an open scope for products defined as electrical and electronic equipment (EEE); tougher rules on exports; and more producer responsibility, all of which will affect importers to the EU and sellers of EEE. It will be recalled that the European Commission proposed a recast of the original WEEE Directive (2002/96/EC) on 3 December 2008.

With regard to recovery, the ENVI Committee voted to reduce the current categories of WEEE from 10 to 6, and supported a target that 70-85% of WEEE be recovered by 2016. Although the European

Commission had proposed a 65% target based on the average weight of WEEE put on the market in 2014 and 2015, Florenz and the ENVI Committee emphasised the need for targets to be based on actual waste because older goods are often stored or given away, rather than thrown away. MEPs further supported the notion that Member States be permitted to set higher national targets themselves.

Although Florenz had proposed a 45% interim target from 2013–2015, the MEPs in the ENVI Committee voted, rather, for a 2012 interim target set at the greater of 4 kg per capita (as in the current legislation) or the volume of waste collected in 2010.

With regard to recycling and reuse, the MEPs voted that 50-75% of WEEE be recycled and that reusable appliances should be separated from other WEEE and adhere to a 5% reuse target. The Committee also called for separate collection targets for small equipment and lamps, claiming that it was important to ensure that these articles, and the hazardous substances contained therein, not fall into the general waste stream.

Furthermore, the Committee favoured an open scope for the recast, so that the WEEE Directive would cover all WEEE aside from vehicles, military material and fixed industrial installations. It voted, among others, for solar panels to be exempt, and for exemptions to be reviewed in five years. This open scope will likely bring more electronic products within the reach of WEEE, although businesses will want to remain attentive to the list of exemptions that may cover their products in the future.

Some industry representatives such as Orgalime (the European Engineering Industries Association), opposed the open scope and warned that even with the exemptions, the open scope created an “unmanageable situation where manufacturers cannot determine whether their product is in scope or not”.

The Committee further voted for Member States to institute tougher inspections on exported waste to address the large amounts of waste that are illegally shipped to developing countries, where inadequate treatment causes serious risks to human health and to the environment. The Commission reportedly estimates that whereas each European generates on average 17-20 kg of WEEE per year, two-thirds of this waste is not collected, treated or reported as per the legal requirements of the existing WEEE Directive. Luigi Meli, Director General of the household appliances industry association CECED, supported this move and commenting that “to tackle the problem of WEEE, the Directive must cover all actors and all WEEE...failure to do this is likely to result in WEEE continuing to be illegally exported once the recast is finally passed into law”.

Finally, the Committee supported the proposal to require retailers to accept small appliances such as kettles or electronic toothbrushes returned to them by consumers, who are already permitted to submit WEEE to retailers free of charge when buying a new equivalent product (under the one-for-one rule).

Overall, environmental groups such as the European Environmental Bureau (EEB) were pleased with the Committee’s “ambition to improve this legislation”. The EEB’s Product and Waste Policy officer Stephane Arditi noted that “the vote paves the way for more consistency between natural resources, ecological products and waste policy”.

Industry groups, however, were somewhat disappointed. The CECED raised concerns that the proposed reuse target could detract from the need to refurbish existing appliances to address consumer health and safety, environmental considerations and energy efficiency. The association did, however, support the “modified, realistic and ambitious” collection target based on the amount of WEEE generated rather than the amount of EEE sold, as well as the open scope.

The report will face a full plenary vote at the European Parliament in September or October this year. Despite the strong support from members of the ENVI Committee, gaining agreement on WEEE from Member States is likely to prove challenging. A Spanish Presidency report examined at the 11 June 2010 Environment Council revealed significant differences in the views of Member States. Most significantly, fourteen delegations said that the Commission’s initial 65% target for WEEE recovery, let alone the 70-85% target, was too ambitious and unrealistic. Member States also disagree on which wastes should be covered by the Directive, and whether producers should be defined nationally or EU-wide.

## ***V. Dumping Watch***

### **A. Notice of initiation of expiry review – bicycles**

On 13 July 2010, the Official Journal published a notice of the initiation of an expiry review of the anti-dumping measures applicable to imports of bicycles originating in the People’s Republic of China.

The product concerned is bicycles and other cycles (including delivery tricycles but excluding unicycles), not motorised, currently falling within CN codes ex 8712 00 10, 8712 00 30 and ex 8712 00 80.

It is recalled that the measures currently in force are a definitive anti-dumping duty imposed by Council Regulation 1524/2000, as last amended by Council Regulation 1095/2005. The request for review was lodged on 13 April 2010 by the European Bicycle Manufacturers Association (“EBMA”) on behalf of producers representing a major proportion, in this case more than 25%, of the total Union production of bicycles. According to the EBMA, the expiry of the measures is likely to result in a continuation of dumping and recurrence of injury to the Union industry.

The Commission has decided to initiate the review. In view of the apparent large number of parties involved in this proceeding, the Commission may decide to apply sampling. The Commission will send questionnaires to the known producers of the like or directly competitive products in the Union, to the known exporters/producers and importers of the product concerned. All interested parties 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. All interested parties may also apply to be heard by the Commission within the same 37-day time limit.

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

### **B. Notice of expiry of anti-dumping measures – bicycles**

On 13 July 2010, the Official Journal published a notice of the expiry of certain anti-dumping measures, namely the anti-dumping duty imposed on imports of bicycles originating in Vietnam.

The product concerned is bicycles and other cycles (including delivery tricycles but excluding unicycles), not motorised, currently falling within CN codes ex 8712 00 10, 8712 00 30 and ex 8712 00 80.

It is recalled that the measures in force are a definitive anti-dumping duty imposed by Council Regulation 1095/ 2005.

Further to the publication of a notice of impending expiry following which no request for review was lodged, the Commission has given notice that the anti-dumping measure imposed on the product concerned expired on 15 July 2010.

### **C. Repeal of undertakings – castings**

On 14 July 2010, the Official Journal published Commission Decision 2010/389/EU repealing Decision 2006/109/EC accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of certain castings originating in the People's Republic of China ("PRC").

The product concerned is castings of non-malleable cast iron and spheroidal graphite cast iron (ductile iron) of a kind used to cover and/or to give access to ground or sub-surface systems, and parts thereof, whether or not machined, coated or painted or fitted with other materials, excluding fire hydrants, currently classifiable within CN codes 7325 10 50, 7325 10 92, ex 7325 10 99 and ex 7325 99 10.

It is recalled that the Council, by Regulation 1212/2005, amended by Council Regulation 500/2009, imposed definitive anti-dumping duties on imports into the Union of certain castings originating in the PRC. The Commission, by Decision 2006/109/EC, amended by Commission Decision 2010/177/EU, accepted a joint price undertaking from the China Chamber of Commerce for Import and Export of Machinery and Electronics Products together with 20 cooperating Chinese companies or cooperating groups of companies.

A verification visit was carried out in 2010 at the premises of one of the co-signatories of the undertaking, Hebei Jize Xian Ma Gang Cast Factory ("Ma Gang") in the PRC. The Commission discovered that Ma Gang had continuously breached the minimum import price imposed in the undertaking by means of a compensatory arrangement with at least one customer in the EU. The Commission also discovered that Ma Gang had made misleading declarations regarding the identity of the exporter by issuing undertaking invoices for sales of the product concerned produced by the other company not subject to the undertaking, and had offered to issue misleading declarations regarding the origin of the product concerned. The fact that Ma Gang gave incorrect information during the verification visit in January 2010 was also considered by the Commission to breach the undertaking.

Therefore, the Commission concluded that the acceptance by the Commission of the undertaking should be withdrawn and Decision 2006/109/EC should be repealed as the joint liability which had been accepted by all co-signatories of the undertaking was an indispensable condition for the

acceptance of the undertaking by the Commission. Accordingly, the definitive anti-dumping duties imposed on imports of the product concerned produced by the companies would apply.

Commission Decision 2010/389/EU entered into force on 15 July 2010.

#### **D. Termination of anti-dumping proceedings - stainless steel fasteners and parts thereof**

On 15 July 2010, the Official Journal published Commission Decision 2010/392/EU terminating the anti-dumping proceeding concerning imports of certain stainless steel fasteners and parts thereof originating in India and Malaysia.

The product concerned is certain stainless steel fasteners and parts thereof originating in India and Malaysia, currently falling within CN codes 7318 12 10, 7318 14 10, 7318 15 30, 7318 15 51, 7318 15 61 and 7318 15 70.

It is recalled that on 30 June 2009, the European Commission received a complaint concerning the alleged injurious dumping of certain stainless steel fasteners and parts thereof originating in India and Malaysia, lodged by the European Industrial Fasteners Institute (“EIFI”) on behalf of producers representing a major proportion, in this case more than 25%, of the total Union production of certain stainless steel fasteners. Consequently, on 13 August 2009, the Commission initiated an anti-dumping proceeding.

However, by its letter of 1 April 2010 to the Commission, EIFI formally withdrew its complaint. The Commission therefore considered that the anti-dumping proceeding should be terminated since the investigation had not brought to light any considerations showing that such termination would not be in the Union interest.

Commission Decision 2010/392/EU entered into force on 16 July 2010.

#### **E. Termination of anti-subsidy proceedings - stainless steel fasteners and parts thereof**

On 15 July 2010, the Official Journal published Commission Decision 2010/393/EU terminating the anti-subsidy proceeding concerning imports of certain stainless steel fasteners and parts thereof originating in India and Malaysia.

The product concerned is certain stainless steel fasteners and parts thereof originating in India and Malaysia, currently falling within CN codes 7318 12 10, 7318 14 10, 7318 15 30, 7318 15 51, 7318 15 61 and 7318 15 70.

It is recalled that on 30 June 2009, the European Commission received a complaint concerning the alleged injurious subsidisation of imports of the product concerned, lodged by the European Industrial Fasteners Institute (“EIFI”) on behalf of producers representing a major proportion, in this case more than 25%, of the total Union production of certain stainless steel fasteners. Consequently, on 13 August 2009, the Commission initiated an anti-subsidy proceeding.

However, by its letter of 1 April 2010 to the Commission, EIFI formally withdrew its complaint. The Commission considered therefore that the anti-subsidy proceeding should be terminated since the investigation had not brought to light any considerations showing that such termination would not be in the Union interest.

Commission Decision 2010/393/EU entered into force on 16 July 2010.

#### **F. Notice of initiation of expiry review – barium carbonate**

On 16 July 2010, the Official Journal published a notice of the initiation of an expiry review of the anti-dumping measures applicable to imports of barium carbonate originating in the People's Republic of China.

The product concerned is barium carbonate with a strontium content of more than 0.07% by weight and a sulphur content of more than 0.0015% by weight, whether in powder, pressed granular or calcined granular form, currently falling within CN code ex 2836 60 00.

It is recalled that the measures currently in force are a definitive anti-dumping duty imposed by Council Regulation 1175/2005. The request for the review was lodged on 19 April 2010 by Solvay & CPC Barium Strontium GmbH & Co. KG, the sole producer of barium carbonate in the European Union. According to the applicant, the expiry of the measures was likely to result in continuation of dumping and continuation of injury to the Union industry.

The Commission has initiated the expiry review. All interested parties 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. All interested parties may also apply to be heard by the Commission within the same 37-day time limit.

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

### **VI. *The Week Ahead***

#### **A. Council**

- 19 July 2010: General Affairs Council (Brussels)
- 19 July 2010: Foreign Affairs Council (Brussels)
- 19-20 July 2010: Informal Energy Council (Brussels)

#### **B. OECD**

- 21-23 July 2010: Corporate Responsibility for Promoting Integrity and Fighting Corruption, conference presented by the OECD-Latin America Anti-Corruption Programme. Sao Paulo, Brazil.

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