

# **BRUSSELS MONITOR**

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## **1. WTO WATCH**

### **EU commits to deadline to comply with WTO ruling on high-tech tariffs**

On 6 January 2011, WTO members were informed that the EU has agreed to remove import tariffs on certain high-tech products by 30 June 2011. This commitment by the EU is the outcome of negotiations with the US, Taiwan and Japan concerning the recent dispute over tariffs imposed by the EU on three high-technology products covered by the 1996 Information Technology Agreement (“ITA”) originating in these countries.

In July 2010, the WTO Dispute Settlement Body ruled that tariffs imposed by the EU on LCD monitors, set-top boxes and multi-functional printers were incompatible with WTO rules. The case concerned the application of the ITA, which provides tariff cuts for products covered by the Agreement. In a joint action, the US, Taiwan and Japan claimed that the EU failed to fulfil its obligations under the ITA by excluding certain products from the scope of the Agreement and imposing tariffs ranging from 6% to 14%.

For its part, the EU argued that monitors larger than 19 inches and equipped with DVI (Digital Visual Interface) and HDMI (High-Definition Multimedia Interface) terminals were regarded as “TV products” and that printers having scanning and faxing functions should be categorised as “copiers”. Likewise, the EU authorities considered set-top boxes with recording and playback features and built-in memory storage to be “multimedia players”. On these grounds, the EU excluded the three products from the scope of exemptions established by the ITA.

The Panel of the WTO Dispute Settlement Body held that the EU’s practice was incompatible with WTO rules, rejecting the EU’s claim that the products in question were objectively different from the goods covered by the ITA. The EU decided not to appeal the WTO’s ruling and entered into negotiations with the countries involved regarding the deadline for compliance.

It has now been reported that a consensus among the parties was reached on 6 January 2010, with the EU committing to bring its laws into compliance with the Panel’s findings by the end of June 2011. The WTO’s 1994 Dispute Settlement Understanding requires that compliance with WTO rules must be achieved within a reasonable period of time, which amounts to 15 months from the date when the WTO panel ruled on the case.

Interestingly, the settlement reached by the EU with the three WTO members coincides with a call by the EU for a review of the ITA provisions. During a meeting of the ITA Committee in November 2010, the EU delegation put forward a proposal

concerning non-tariff barriers as well as product coverage and membership. Among others, the EU argued that certain products covered by the ITA have significantly developed since its conclusion in 1996 and no longer serve the original purpose recognised in the ITA. Reportedly, the members of the ITA Committee expressed their willingness to further discuss the review process during its next meeting.

## **2. EUROPEAN UNION: TRADE**

### **French carbon footprint labelling law starts off as “experiment” but could lead to mandatory measures**

On 3 November 2010, the French Ministry for Ecology and Sustainable Development launched a call for applications addressing companies to take part in a national experiment on the environmental labelling of consumer products. This experiment is foreseen in Article 228 of the French Law on the national commitment to the environment (the so-called “Grenelle II” Law).

Businesses beleaguered by the EU’s existing and soon-to-be enacted environmental rules affecting their products, may be unhappy to note that the Grenelle II Law introduced new and burdensome provisions for goods sold in France. However, it may come as a relief that the Grenelle II Law sets out a *voluntary* environmental labelling scheme, instead of the mandatory scheme initially envisaged, which would have applied to all consumer goods sold in France as of 1 January 2011.

Pursuant to Article 228 of the Grenelle II Law, this voluntary environmental labelling scheme will be “tested” from 1 July 2011 to 1 July 2012 in the form of a one-year pilot labelling project. This will then give rise to an evaluation of the opportunity of generalising the scheme. Following that evaluation, the environmental labelling scheme may become compulsory, applying by category of products, as needed.

The objective of the experiment is therefore to evaluate the feasibility of making the environmental information on products available to consumers. The information to be provided on products will not be restricted to the CO<sub>2</sub> equivalent content of the products but will also concern, among others, the consumption of water or natural resources and the impact on natural environments.

In a speech of 21 October 2010, the French State Secretary for Ecology, Chantal Jouanno, explained that this experiment would allow the addressing of complex issues such as the impact of imported products (and/or imported components), technical feasibility (traceability of the information required to calculate indicators and means for making this information available), the economic cost and data confidentiality issues.

In this context, the Ministry has already made calls for volunteers to submit their proposed voluntary projects (individual or group projects). The projects selected will be part of this national experiment. The call for applications was directed at all entities (companies, groups, trade associations, etc.) and aimed at selecting the largest and most diversified sample group possible for the one-year pilot labelling project.

The one-year pilot labelling project will be launched from 1 July 2011, for a minimum duration of one year. As from the second semester of 2012, the experiment will be subject to an evaluation, to be subsequently transmitted to the French Parliament.

### **3. EU COMPETITION**

#### **Advocate General Mazák delivers opinion on disclosure of leniency applications**

Advocate General Mazák of the European Court of Justice (“ECJ”) recently delivered his opinion in a reference for a preliminary ruling from Bonn Local Court, arising out of a damages claim in the recent paper cartel in Germany.

By a decision of 2008, the German Federal Cartel Office (“FCO”) imposed fines totalling €62 million on the three largest European producers of decor paper for participating in a cartel. This finding was based in part on information and documents that the FCO received in the context of its leniency programme. Pfeiderer AG, one of the world’s leading manufacturers of engineered wood, is a purchaser of decor paper. In order to prepare for civil proceedings for the recovery of damages against the cartelists, Pfeiderer applied to the FCO for comprehensive access to its file. Following a partial refusal of this request, Pfeiderer appealed to Bonn Local Court, which sought clarification from the ECJ on whether and if so to what extent, a national competition authority may disclose information, voluntarily communicated to it by members of a cartel pursuant to the authority’s leniency programme, to an aggrieved third party for the purpose of the preparation by the latter of an action for damages in respect of alleged injury caused by the cartel.

In his opinion, Advocate General Mazák noted the apparent tension between, on the one hand, the effective operation of a leniency programme by a national competition authority and, on the other hand, the grant of access to a third party, for the purposes of assisting it in bringing an action for damages pursuant to Article 101 TFEU, to information provided by a leniency applicant.

In the Advocate General’s view, the disclosure by a national competition authority of all of the information and documents submitted by a leniency applicant could seriously undermine the attractiveness and thus the effectiveness of that authority’s leniency programme. On the other hand, according to Advocate General Mazák, in

the absence of overriding legitimate reasons of public or private necessity, a national competition authority should not deny an allegedly injured party access to documents in its possession which could be produced in evidence in order to assist the latter in establishing a civil claim against a member of a cartel, as this could *de facto* interfere with and diminish that party's fundamental right to an effective remedy which is guaranteed by Article 101 TFEU and Article 47, in conjunction with Article 51, of the EU Charter of Fundamental Rights, and Article 6(1) of the ECHR.

Thus, Advocate General Mazák considered it necessary to preserve as much as possible the attractiveness of a national competition authority's leniency programme without unduly restricting a civil litigant's right of access to information and ultimately an effective remedy. To this end, Advocate General Mazák drew a distinction between two types of information:

- voluntary self-incriminating statements made by leniency applicants in the course of a leniency procedure and for the purposes of that procedure, which should not be disclosed to private litigants; and
- all other pre-existing documents submitted by a leniency applicant in the course of a leniency procedure, which may be disclosed to parties seeking to bring damages actions.

Should the ECJ follow the opinion of its Advocate General this would mean that the national legislation of several Member States could be incompatible with EU law. In France, for instance, on 14 December 2010, the French Senate adopted a Bill on the simplification and improvement of the quality of law, which prohibits disclosure of any documents held by the French Competition Authority in the context of its powers of investigation and decision, including documents obtained in the course of the Authority's leniency procedure.

#### **4. EUROPEAN UNION: REGULATORY**

##### **Struggle continues among regulators for a recast WEEE law**

Sellers of all types of electrical appliances will likely already know that the 2002 Directive on waste electrical and electronic equipment (the WEEE Directive) is currently undergoing a revision (in EU parlance, a "recast"). The recast will in all probability impose stricter measures in some areas of the WEEE Directive, but there continue to be major differences of opinion between the EU's lawmakers (the European Parliament, Council of Ministers and Commission) over exactly how strict the recast should be, particularly in some areas.

At the Environment Council meeting of 20 December 2010, the Member States' environment ministers continued to discuss revised collection targets for the recast

WEEE law, i.e., the levels at which waste equipment should be collected for treatment and recycling in the Member States over the coming years; and the scope of the equipment to be covered by the revised law.

The collection targets are perhaps the most controversial aspect of the recast. It may be recalled that the European Parliament's environment committee (ENVI committee) has been demanding that Member States collect, as of 2016, a minimum of 85% of WEEE that is being generated. The Commission had proposed a figure of 65% in its initial 2008 recast WEEE proposal. At the 20 December Council meeting, it appeared that the chances of swift agreement on the recasts are now even more remote: the majority of Member States seem even to be against the Commission-proposed 65% target. There is thus dissension all around.

The recent Belgian presidency of the EU Council introduced a compromise proposal according to which Member States would need to meet a 45% collection target four years after entry into force of the WEEE recast, increased to 65% six years after its entry into force. Some Member State delegations (not a majority) are opposed even to this (wishing, instead, to have a longer transition period).

Deciding on the scope of the WEEE recast is also proving divisive. Just under a majority (12 Member States) support Belgium's compromise proposal for an open scope – where all WEEE (including photovoltaic panels) would be included, except for some limited items which would be expressly excluded. However, a matching number of Member States want the scope defined (with specific products laid out in the annexes – similar to the way it looks currently).

The Member States are also squabbling with the Commission on registration. All delegations wish to stick to national registration, as – in their view – an EU register would entail difficulties in implementation, especially when it comes to financial responsibility of producers for WEEE management, and for meeting the collection and recovery targets. It may further be recalled that on registration, information and reporting, the European Parliament's ENVI committee sought a reduction in barriers to the operation of the internal market, by standardising registration and reporting and by preventing multiple charges for multiple registrations in individual Member States. In this sense, it supports the Commission's view.

Another contentious aspect has been recycling and re-use targets. The ENVI committee has already proposed a simplified system involving six categories of WEEE instead of 10. Depending on the category to which it belongs, 75% to 85% of WEEE should be recovered and 50% to 75% recycled. Reusable equipment should be separated from other WEEE and a target of 5% for re-use should apply to the appropriate categories.

The ENVI committee has also stated its desire to see more costs borne by producers and other actors. For costs relating to WEEE collection from households (e.g., by

installing more collection points, organising awareness-raising campaigns, door-to-door collection events and other activities designed to collect as much as possible), the costs associated with these actions should be fully covered according to the polluter pays principle. The polluters here would be the producers, retailers and consumers, but not the general taxpayer.

The latest news from the European Parliament continues to be that the WEEE recast will be discussed and put to a vote in a plenary session during the early part of 2011. As long as there is agreement from the Council, it could be adopted very soon after that. The Member States will then be given (it is expected) 18 months to transpose and implement the recast WEEE Directive's provisions.

## **5. DUMPING WATCH**

### **A. Impending expiry of certain anti-dumping measures – side-by-side refrigerators**

On 8 January 2011, the Official Journal published a Notice of the impending expiry of certain anti-dumping measures, namely, the anti-dumping duty imposed on imports of certain side-by-side refrigerators originating in the Republic of Korea.

The product concerned is side-by-side refrigerators, i.e., combined refrigerator-freezers of a capacity exceeding 400 litres, with the freezer and refrigerator compartments placed side-by-side, falling within CN code ex 8418 10 20 (TARIC code 8418 10 20 91).

It is to be recalled that definitive anti-dumping duties were imposed on the product concerned by Council Regulation 1289/2006.

Union producers may lodge a written request for a review at any time from the date of the publication of the notice but no later than three months before the expiry date, namely, 1 September 2011. Should the Commission decide to review the measures concerned, importers, exporters, representatives of the exporting country and Union producers will then be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request.

### **B. Impending expiry of certain anti-dumping measures – lever arch mechanisms**

On 8 January 2011, the Official Journal published a Notice of the impending expiry of certain anti-dumping measures, namely, the anti-dumping duty imposed on imports of certain side-by-side refrigerators originating in the People's Republic of China.

The product concerned is lever arch mechanisms for archiving sheets and other documents in binders and files and falling within CN code ex 8305 10 00 (TARIC code 8305 10 00 50).

It is to be recalled that definitive anti-dumping duties were imposed on the product concerned by Council Regulation 1136/2006.

Union producers may lodge a written request for a review at any time from the date of the publication of the notice but no later than three months before the expiry date, namely 28 July 2011. Should the Commission decide to review the measures concerned, importers, exporters, representatives of the exporting country and Union producers will then be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request.

### **6. THE WEEK AHEAD**

#### **A. Council**

- 18 January 2011: ECOFIN Council
- 19-20 January 2011: Home Affairs informal Council (Bp. & Gödöllö)
- 20-21 January 2011: Home Affairs informal Council (Bp. & Gödöllö)

#### **B. Parliament**

- 17-20 January 2011: European Parliament plenary session (Strasbourg)

#### **C. WTO**

- 18-20 January 2011: Trade Policy Review Body – Jamaica

#### **D. OECD**

- 17 January 2011: OECD statistical news releases: GDP Growth 4th quarter 2010.
- 17 January 2011: OECD Tokyo Policy Forum "OECD International Migration Outlook", presentation by Jean-Pierre Garson and Jean-Christophe Dumont, International Migration Division, OECD. OECD Centre in Tokyo, Japan.
- 20-21 January 2011: Social Cohesion and Development, conference organised by the Development Centre with support from the International and Ibero American Foundation for Administration and Public Policies (FIIAPP).

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