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E-ALERT | EU TRADE POLICY

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EU COMMISSION COMMUNICATION ON THE FUTURE OF EU TRADE POLICY

The European Commission (the 'Commission') recently published its trade strategy for the years 2010-2015 in the form of a Communication entitled "Trade, Growth and World Affairs" (the 'Communication'). The Communication is accompanied by a Commission Staff Working Document providing the economic analysis, statistics and background material in support of the Communication. The strategy is aimed at reducing trade barriers and opening global markets for European businesses. It focuses on five main areas: (i) multilateral, regional and bilateral agreements, (ii) public procurement, (iii) foreign investment policy, (iv) export controls, and (v) intellectual property rights ('IPRs'). The strategy offers some key opportunities for industry to influence the EU's approach to its trading partners.

PROPOSED ACTIONS

The actions outlined by the Communication include:

- Advancing the Doha Development Agenda ('DDA') and pursuing more regional and bilateral deals;
- New legislation to increase the access of European businesses to public procurement markets in developed countries and large emerging market economies, including China (by the end of 2011);
- The adoption of a new EU foreign investment policy (by the end of 2011);
- Changes to the EU strategy on the enforcement of IPRs in third countries and the EU customs regulation on IPRs enforcement at the EU border (to be launched in 2011);
- An overhaul of the EU export control system for dual-use goods and technology (to be launched in 2011).

DDA, REGIONAL AND BILATERAL AGREEMENTS

The Commission seeks to: (i) conclude the DDA as a matter of urgency, (ii) make significant progress with ongoing Free Trade Agreement (FTA) negotiations and launch new FTA negotiations, and (iii) upgrade the EU's relationship with four major trading partners: the US, Japan, China and Russia.

For several reasons, European companies should follow these negotiations very closely and ensure that their voices are heard. European industry still suffers from a variety of market access barriers in third countries, including restrictive measures in the agri-food, pharmaceutical, telecommunications, automotive, services and raw materials sectors. New barriers continue to be erected, as a recent EU Report on Potentially Trade Restrictive Measures, May-September 2010 showed. The FTA negotiations offer industry an opportunity to have such barriers in third countries eliminated or reduced. At the same time, the Union's trading partners will use the FTA negotiations to gain better access to the EU market, which can create opportunities for trading companies as well as threats for EU industries.

The FTA agenda includes:

- **Canada:** negotiations launched in May 2009, currently continue;
- **Gulf countries** (Gulf Cooperation Council, 'GCC'): no dates for the next round agreed, informal consultations between EU and GCC chief negotiators continue;
- **India:** negotiations launched in 2007, currently continue (EU-India Summit to be held in Brussels on 10 December 2010);
- **ASEAN:** negotiations launched in 2007, currently stalled;
- **Singapore:** negotiations launched in March 2010, currently continue;
- **Malaysia:** negotiations launched in October 2010, currently continue;
- **Mercosur region:** negotiations relaunched in May 2010, currently continue;
- **Eastern Partnership countries** (Ukraine, Belarus, Moldova, Azerbaijan, Armenia and Georgia) and the Euro-Mediterranean Partnership countries (Morocco, Algeria, Tunisia, Egypt, Jordan, Lebanon, Israel, Palestinian National Authority): new agreements envisaged or under way.

In terms of relations with China, Russia, Japan and Brazil, the EU will enhance the regulatory dialogue in the framework of: (i) the Transatlantic Economic Council (TEC), (ii) High Level Economic and Trade Dialogue between EU and China, (iii) High Level Group (HLG) between EU and Japan, and (iv) negotiations for the bilateral agreement between the EU and Russia aimed at replacing the current EU-Russia Partnership and Cooperation Agreement. With regard to China, key issues include market access, in particular standards and regulations, services, investment and public procurement, insufficient enforcement of IPRs, China's opaque standardisation system, burdensome certification procedures, industrial policy measures aimed at import substitution, forced transfers of technology, and access to raw materials.

RECIPROCITY ON PUBLIC PROCUREMENT

The Communication recognises the critical importance of government procurement to EU exporters. The WTO Government Procurement Agreement (GPA) provides the main international legal framework for ensuring access to public procurement markets. However, the GPA currently binds only 14 WTO members[1] and the percentage of total public procurement market subject to GPA provisions is relatively small. In addition, there is a significant disproportion in the commitments of the GPA parties: the public procurement market open to bidders from other GPA parties is equivalent to 15% in the EU and 14% in Korea, but it accounts to only 4 % in Canada, 3.2% in the US, and 1 % in Japan.[2] Importantly, China is not a GPA member and China's accession negotiations have more or less stalled.

The Communication outlines three priority actions in the field of public procurement: (i) a push for the accession of China and other trading partners to the GPA, (ii) inclusion of provisions on the access to public procurement contracts for EU companies in bilateral and regional FTAs, and (iii) the adoption of new legislation to increase EU leverage in access to public procurement markets in developed and large emerging economies, including China. The Commission provided little by way of detail with regard to the new legislation it will propose (anticipated in the first half of 2011). Most likely this will take the form of a trade defense instrument allowing the EU to restrict the access of goods or services from the targeted country to the EU procurement market..

[1] The EU and its main trading partners: Canada, Hong-Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Norway, Singapore, Switzerland, Taiwan, and the United States.
[2] Commission Staff Working Document "Trade as a driver of prosperity", Brussels, SEC(2010) 1269.

EU FOREIGN INVESTMENT POLICY

Until the entry into force of the Lisbon Treaty, foreign investment policy was an exclusive competence of the EU Member States, exercised through the adoption of the so-called Bilateral Investment Treaties (BITs) between individual Member States and third countries. Member States have concluded some 1,200 BITs since 1959. The Lisbon Treaty, however, grants exclusive competence in the field of foreign investment to the EU. In July 2010, the Commission launched an EU foreign investment initiative by adopting: (i) a Communication outlining how the Commission intends to develop a new EU foreign investment policy, and (ii) a proposal for a Regulation that would establish transitional arrangements relating to existing BITs. The proposed EU foreign investment policy will combine market access liberalisation and investment protection.

The Commission has prioritised: (i) the expansion of its mandate in the ongoing FTA negotiations (EU-Canada, EU-India, EU-Singapore and EU-Mercosur) so as to include foreign investment liberalisation and protection provisions, (ii) the conclusion of stand-alone investment agreements with other countries (likely including China and/or Russia), and (iii) the conclusion of sectoral investment agreements. The investment provisions in these agreements will be enforced through both (i) state-to-state dispute settlement (similar to the mechanism included in recent FTAs), and (ii) investor-to-state dispute settlement (similar to the arbitration mechanism in BITs).

Any agreements concluded by the Commission will replace the existing BITs between the individual Member States and the third countries. Industry from Member States that have in force BITs affording investors a high level protection need to be vigilant that this standard is maintained or that, as a minimum, their existing investments are protected as well as before the conclusion of the new agreements. More generally, industry should ensure that the Commission achieves a high degree of protection and provide the Commission with the necessary information and input.

IPR ENFORCEMENT

The Commission plans new legislation to strengthen IPR enforcement both in the EU as well as in foreign markets, and streamline procedures. It will do so by: (i) a review of the customs regulation on IPR enforcement at the EU borders, (ii) better harmonisation of the rules governing IPR enforcement in the EU, (iii) inclusion of IPR clauses in the FTAs negotiated by the EU, and (iv) conclusion of the Anti-Counterfeiting Trade Agreement (ACTA). The Commission also indicates that it will revisit its strategy for IPR enforcement in third countries, based on the evaluation study published in November 2010.

Not surprisingly, China is a key concern of the Commission's IPR-related efforts. According to the Commission staff working document published together with the Communication, China remains by far the most important source country for goods suspected of infringing IPRs, and accounts for almost two thirds of all goods detained by customs for reasons of IPR violations.

EXPORT CONTROLS

The Commission plans to overhaul the EU export control system for dual-use goods. The Communication cites the need for simplification and increased transparency of export control measures, underlining as well the need to strengthen the EU's international security efforts. While this description is very general, the export controls initiative will most likely include the adoption of the EU General Export Authorizations proposed in 2008. Other amendments to the current export controls system for dual-use goods will be revealed in 2011, when the Commission adopts a Green Paper and starts consultations on the functioning of the current system and possible areas of reform.

CONCLUSIONS

The Commission's five year trade policy provides abundant opportunities for companies engaged in international trade and investment to advocate measures that can increase sales, revenues, and profits. Covington's EU trade team has deep expertise in the areas covered by the strategy and would welcome the opportunity to work with companies to analyse these opportunities and assist companies in advocating their interests.

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