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REPORT FROM THE COMMISSION TO THE EUROPEAN COUNCIL

Trade and Investment Barriers Report 2014

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1. Introduction

The 2014 Trade and Investment Barriers Report (TIBR), like the previous three editions, addresses a selection of key barriers faced by European Union (EU) companies on the markets of the EU's strategic partners, i.e. China, India, Japan, Mercosur¹, Russia and the United States (US). Its main objective is to raise awareness of the main trade restrictive measures and reaffirm the importance of tackling such barriers in a focused and concerted way.

This fourth edition of the TIBR provides an account of progress achieved with regard to barriers identified in the previous editions and analyses a number of new measures that are a cause of serious concern. Although substantial headway has been made on many trade-restrictive measures, some barriers still persist and the EU needs to continue addressing them forcefully with its strategic partners. A significant number of barriers are related to local content requirements which are often established by emerging countries (notably China, India and Brazil).

EU enforcement actions, of which the TIBR is a part, complement an ambitious negotiating agenda to ensure that EU industry's insertion in global supply chains actively supports our overall strategy for jobs and growth. As we gradually emerge from the recession, it is of the utmost importance to ensure that market conditions on the export and investment markets of our strategic partners are open and fair. In the context of the EU Market Access Strategy, the Commission is actively engaged with a far larger group of trading partners to improve market access conditions for EU companies in these markets as well.

Trading conditions should also improve thanks to the conclusion of the "Bali Package" at the 9th WTO Ministerial Conference in December 2013 which establishes new multilateral disciplines on trade facilitation². At the plurilateral level, negotiations on a Trade in Services Agreement (TISA) are on-going, while negotiations to expand the scope of the Information Technology Agreement (ITA) are also continuing but have been suspended in November 2013. In the margins of the World Economic Forum in Davos in January 2014, the EU together with 13 other WTO members pledged to launch plurilateral negotiations on liberalising trade in green goods.

In parallel with this multilateral and plurilateral agenda, the EU conducts a large and ambitious bilateral agenda in order to open up third country markets. First of all, negotiations with the US on a Transatlantic Trade and Investment Partnership (TTIP) are of the utmost importance. A far-reaching and ambitious TTIP Agreement which includes strong disciplines on regulatory cooperation and regulatory coherence could help reduce non-tariff barriers

¹ Brazil/Argentina

²Cf. http://www.wto.org/english/news_e/news13_e/mc9_06dec13_e.htm

(NTBs) which EU companies are still facing in the US. It could also set global standards in many areas and encourage a number of third countries to follow suit, to the benefit of the EU exporting industry.

Bilateral negotiations with Japan are also well on track. During the fourth round of talks held in Brussels in January 2014, both sides were already discussing each side's proposals for the text of the future FTA. The EU continues to put a strong focus on NTBs which significantly hamper market access for EU companies in Japan in many sectors.

Negotiations with Canada on a Comprehensive Economic and Trade Agreement (CETA) were concluded at political level on 18 October 2013. The trade agreement with Peru and Colombia has been provisionally applied in Peru since 1 March 2013 and in Colombia since 1 August 2013. The trade pillar of the EU-Central America Association Agreement has been provisionally applied since 2013. On 29 November 2013, Georgia and Moldova initialled Association Agreements including Deep and Comprehensive Free Trade Agreements with the EU while Ukraine and Armenia, by contrast, have decided not to initial the Association Agreements at this stage.

Moreover, the EU is engaged in Free Trade Agreement (FTA) negotiations with a number of other third countries and regions, namely Mercosur, India, Malaysia, Vietnam, Thailand and Morocco. The EU and Singapore initialled a FTA on 20 September 2013; with Indonesia and the Philippines, the EU is still at an early stage of preparatory work to explore the scope and level of ambition of future FTA negotiations. Exploratory talks with Mexico are underway with regard to a possible modernization of the existing FTA.

The EU also continues its efforts to ensure a full and smooth implementation of the EU-South Korea FTA which entered into force on 1 July 2011³.

In view of the EU's comprehensive negotiating agenda, it is all the more important to make sure that trading opportunities created by these negotiations are indeed translated into real trade flows on the ground. Against this background, the TIBR 2014 highlights the most important market access barriers established by our strategic partners.

The EU Market Access Strategy further addresses these measures via a continuous process of selection and prioritisation of key barriers which has resulted in the identification of 220 barriers in 32 third country markets. Recently, the Commission started to engage in an exercise to quantify the EU's success rate in removing key barriers. According to this analysis, as of October 2012, on a total of 220 key barriers, positive outcomes have occurred in 70 cases which have resulted in overall benefits for the EU amounting to approximately EUR 2 billion annually.

Finally, the Commission regularly publishes a "report on potentially trade-restrictive measures"⁴. The tenth such report evaluating developments over the period between May 2012 and May 2013 indicated that 154 new measures were introduced by G20 members whereas only 18 measures were lifted. Overall, the total number of potentially trade-restrictive measures is estimated to have grown up to 688.

³ <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/>

⁴ http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151703.pdf

On investment, recent developments in third countries have shown worrying trends for European investors in an increasing number of countries. Very often these cases include non-respect of existing bilateral agreements on the promotion and protection of investments (BITs) with various EU Member States, i.e. especially as regards acts tantamount to expropriation of the investor, but also de facto or even de iure renationalisation of companies successfully run by a foreign investor. A number of claims have been brought to international jurisdiction such as in the case of Argentina or Russia, and some of them have led to positive outcomes (see Argentina/Repsol under 2.1). Moreover, the termination, or plans for termination, of BITs is having a negative effect on the investment climate in certain countries and on their attractiveness as investment destination for EU companies. The decision by South Africa to terminate its BITs with EU Member States and the draft legislation currently planned to replace these BITs, that would not be able to guarantee to investors a comparable legal security and predictability as they have enjoyed so far, are matters of particular concern.

2. Results of EU action taken in 2013 on market access and investment barriers

The numerous barriers identified by the TIBR 2013 in the markets of strategic partners have been treated as key priorities in our bilateral relations due to their major importance for EU business and often systemic impact. The Commission and Member States have thus systematically raised them in all bilateral meetings, often up to the highest political level.

On a good number of barriers included in the 2013 TIBR, substantial or partial progress has been achieved. In these cases, EU action taken under the auspices of the Market Access Strategy played a major role. In other cases, no progress could be registered despite our best efforts. Notably, with regard to Russia, a significant number of market access issues persist despite the country's accession to the WTO in August 2012. As has been the case in previous years, the TIBR 2014 also presents a selection of important new barriers.

2.1 Successful EU action in 2013

A significant number of market access barriers outlined in the previous three editions of the TIBR have been fully or partially lifted in 2013.

China

China has undertaken important steps to adopt a more business-friendly investment policy. On 27 September 2013, notice Guo Fa 2013 No. 38 was issued by the State Council which established the China (Shanghai) Free Trade Zone. Although this is a limited and focused experiment in the opening-up and reform process, it has the potential of becoming a first step in reducing investment restrictions. In the past, limited experiments of this type have been breeding grounds for larger reforms.

At the 16th EU-China Summit on 21 November 2013, both sides formally launched negotiations on a comprehensive bilateral Investment Agreement, covering both investment protection and market access. The proposed EU-China Investment Agreement will be the first

occasion for the EU to negotiate an investment-only agreement on the basis of the new competences granted by the Lisbon Treaty. China has confirmed that it will apply a “negative list” approach in its investment negotiations with the EU.

China has implemented the positive ruling of the 31 January 2012 WTO Appellate Body report on raw materials export restrictions. As regards the second case on China's export restrictions on rare earths, tungsten and molybdenum which was launched on 13 March 2012, the WTO proceeding is currently ongoing. The final report of the WTO Panel is expected for the beginning of 2014.

With regard to the VAT exemption for domestically produced regional aircrafts, China's Ministry of Finance has notified the EU on 9 September 2013 that it had repealed Circular 51, issued in 2000, and Circular 97 of 2002, which granted a VAT exemption for sales of specific models of domestically manufactured regional aircrafts in China. If confirmed, this will constitute a positive development to resolve a long-standing discrimination against imports of regional aircraft. The EU has asked China to provide documented evidence of the announced measures allowing for legal certainty for EU economic operators.

The International Working Group on Export Credits (IWG) had 3 meetings in 2013, the September meeting being hosted by the EU. The IWG discusses export financing conditions and subsidies, a topic which is particularly important in EU-China relations. The group began negotiating credit guidelines for the ships and medical equipment sectors, aimed at setting international guidelines on export financing that are consistent with international best practices.

China introduced discriminatory customs and taxation measures affecting the logistics and shipping industries on 24 May 2013 when the Ministry of Finance (MoF) and the State Administration of Taxation (SAT) issued a new VAT circular for the transportation industry, which expanded the current Business Tax to VAT (B2V) pilot programme nationwide. Circular 37 came into effect on 1 August 2013. The freight forwarders are no longer allowed to deduct certain cost items, such as international transportation freight, from their tax base and were required to apply 6% VAT and a 0.8% additional local surcharge on gross proceeds (including freight costs) collected from clients. Foreign industry representatives estimated the potential costs of this measure to their freight business interests to be above EUR 2 million per week.

The EU together with local partners engaged in a constructive dialogue with the Chinese authorities to resolve this serious problem. On 12 December 2013, a joint circular was issued by MoF and SAT which corrects the discriminatory effects of Circular 37, and once again exempts the logistics industry from the VAT and surcharge.

India

In India, the implementation of the preferential procurement policies for domestically manufactured electronic goods and telecom products due to security considerations set out in 2012 has been suspended by the government. Planned and already adopted provisions had specified that for electronic and telecom products having security implications domestic preference would have to be applied in a mandatory manner for both public and most importantly private purchasing entities (e.g. telecom services operators). This would have been a significant burden for companies. While for public procurement the policies are not cancelled, but are being reviewed, the July 2013 announcement explicitly excludes domestic

manufacturing requirements (percentage-based or other) in the private sector and for security reasons. For electronics products, India has on 23 December 2013 adopted a new preference policy which indeed drops security reasons and only addresses public procurement. The EU will continue to make the case for the withdrawal of unjustified local content measures.

India has also postponed on two occasions the mandatory testing and certification requirement of telecom network elements for security reasons to 1 July 2014. Nonetheless, the EU will continue to insist on India basing its requirements on relevant international telecom equipment security standards and on the acceptance of test reports and certificates issued by qualified foreign laboratories.

Regarding mandatory compliance of steel products with new national standards and certification by the Bureau of Indian Standards (BIS), the date of entry into force of mandatory certification requirements for certain steel products was shifted to April 2014. In addition, in August 2013, some products that are directly supplied for major projects subject to some conditions (in infrastructure, petroleum, manufacturing products involving high-end technologies, nuclear reactors, defence, chemicals and petro-chemicals, and fertiliser sectors) were exempted from the certification scheme. However, some difficulties linked to the registration process persist.

India has also formally extended a grace period for the compulsory registration of 15 categories of IT and consumer electronics goods to 3 January 2014 (the original date was 3 April 2013). A notice of May 2013 allowed acceptance of tests carried out by foreign certification bodies which are either members of the IECEE CB⁵ scheme or by laboratories holding international accreditation under the ILAC MRA⁶ “until further notice”. It will be important to ensure that no further mandatory testing by Indian laboratories will be required in practice as this could entail an important backlog in the market authorisation of a massive amount of electronic goods exported to India and would put significant additional costs and marketing time pressure on foreign companies. The imposition of (short) validity periods of the test reports issued would also further aggravate the problem. Despite the acceptance of foreign test results, the scheme appears too burdensome in view of the low safety risks associated with the products concerned.

Finally, India introduced some changes in investment rules and opened the possibility for 100% foreign ownership in the telecoms sector. There was also a positive development in single-brand retail investments. Following the opening of the sector, some European companies have already applied for and received licences. A European company has also applied for a multi-brand retail license, the first for a foreign company in India.

Brazil / Argentina

For Brazil, progress can be reported on the list of 100 temporary exceptions to the Common External Tariff (CET). The application of the list, which started in September 2012, was

⁵ Worldwide System for Conformity Testing and Certification of Electrotechnical Equipment and Components (IECEE) Certification Body (CB) Scheme: <http://www.iecee.org/>

⁶ International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Agreement (MRA): <https://www.ilac.org/>

terminated by the end of October 2013. Even more importantly, a new list of 100 CET exceptions envisaged in early 2013 was eventually not enforced.

As regards the discriminatory tax advantages which Brazil grants notably to domestic producers of automotive vehicles and electronics that fulfil certain local content requirements, the EU has launched a request for WTO Dispute Settlement proceedings on 19 December 2013⁷.

In Argentina, non-automatic licences were eliminated (except for bicycles) in January 2013, but other trade/import restricting measures are still ongoing, notably the requirement to fill out a “sworn prior importer declaration (DJAI)” for all imports. Upon request of the EU, the US and Japan, a WTO Dispute Settlement panel was set up in May 2013 to examine the dispute on DJAI and other unofficial import-restrictive measures such as import balancing requirements for importers⁸. Argentina also maintains restrictions on the transfer of foreign currencies, dividends and royalties which have become an important part of its economic policy and are used for example to manage the exchange rate. Argentina also applies restrictions in the reinsurance services sector.

In April 2012, the Argentine government expropriated 51 percent of YPF, the Argentine unit of Spain's oil company Repsol, without providing adequate and timely compensation. Upon expropriation, Repsol requested compensation for the loss of a large part of its oil production capacity and reserves. In late November 2013, an agreement of principle for compensation was reached between Argentina and Repsol on the suspension of legal actions and on a process for determining a compensation amount. Negotiations on the details of a final agreement have begun.

United States

The United States have expanded the list of EU Member States or regions that are considered free of Classical Swine Fever (CSF), Avian Influenza, Newcastle disease, and partially Swine Vesicular Disease (SVD). A final rule on Bovine Spongiform Encephalopathy (BSE) was published by the end of 2013 after several years of discussion. The EU expects that exports to the US of beef will now shortly resume. However, animal disease assessments are still pending for some EU Member States that have the same disease status in accordance with EU harmonised legislation. Rather than treating Member States individually, US import conditions should reflect the reality of the EU single entity and single market as well as the animal health management decisions adopted by the EU in due time and the existing provisions of international standardisation bodies (e.g. Office International des Epizooties). EU applications for exporting products of animal origin face long delays for example as regards Grade A dairy products, live bivalve molluscs and small ruminant products. The EU also remains worried by the extremely long delays in treating other Sanitary and Phytosanitary (SPS) export applications submitted by the EU, e.g. for apples, pears, stone fruits and bell peppers. The ongoing negotiations with the US on a Transatlantic Trade and Investment Partnership (TTIP) offer the opportunity to discuss SPS issues in a new context.

⁷ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds472_e.htm

⁸ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds445_e.htm

Japan

Since the start of the negotiations for a comprehensive FTA with Japan in April 2013, four rounds of talks took place. Some progress has been achieved but further efforts are necessary. Non-tariff barrier-related discussions in the FTA context continue. On some of these barriers (e.g. organic food, liquor wholesale licensing), Japan has already complied with its commitments agreed during the preparatory phase to the launch of the FTA negotiations (the so-called "scoping"), while on some others, scoping and FTA discussions produced partial progress (e.g. on pharmaceuticals, food additives, beef, radio and telecommunications equipment certification, medical devices authorisation procedures). For instance, concerning food additives 38 out of 46 substances requested by the EU have already been approved, two are expected to be authorised in June 2014 and the remaining six are currently undergoing risk assessment. Japan has also made progress for EU beef market access by authorising already three Member States to export meat under 30 months and applications of several other Member States are in the process of being approved.

2.2 Unresolved market access barriers requiring further EU action

Unfortunately, several barriers outlined in the previous three editions of the TIBR persist and continue to significantly hamper market access of EU operators⁹. More EU action under the Market Access Strategy will be carried out to ensure that progress is made on these issues. This concerns notably the following trade-restrictive measures:

China

- “Indigenous Innovation Policy”
- Local content requirements
- Information security barriers, including the revision of Commercial Encryption Regulations
- Cosmetics regulations

India

- BIS (Bureau of Indian Standards) certification regime for tyres
- SPS issues (e.g. pork, bovine genetic material, plant and plant products)

Brazil /Argentina

- Argentina: Local content requirements
- Brazil and Argentina: Measures hindering the provision of maritime services between Mercosur countries

⁹ A description of these barriers can be found in the TIBR 2013, see http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150742.pdf

2.3 Focus – Russia, one year after its WTO accession

Although it acceded to the WTO in August 2012, Russia has still not fully implemented its WTO commitments. The EU remains concerned with a host of barriers that continue to hamper access to the Russian market for EU economic operators.

For a list of more than 150 products including meat, garments, refrigerators, used vehicles, car bodies, paper products and ITA products Russia has incorrectly implemented its WTO bound tariffs. Whereas some lines have been corrected on 1 September 2013, some issues still remain on products such as paper, car bodies and agricultural products.

On 9 July 2013, the EU launched its first WTO Dispute Settlement case with Russia to tackle a recycling fee on motor vehicles applying to imported cars. On 15 October 2013, the Duma passed an amendment that requires domestic car makers to pay the same recycling fee as foreign manufacturers, thereby removing the discriminatory elements contained in the original bill. However, the implementation of this bill as well as possible compensation measures for domestic car manufacturers still need to be monitored very carefully over the coming months.

Regarding the wood tariff-rate quotas (TRQs) under the bilateral EU-Russia Wood Agreement concluded in the context of Russia's WTO accession, some progress has been achieved recently through the abolition on 4 November 2013 of the discriminatory "list of exporters" previously maintained by Russia. This had greatly limited the eligibility of companies to export under the wood TRQs.

In the field of SPS measures, non-transparent, discriminatory, and disproportionate control and approval procedures, excessively stringent requirements on antibiotic residues, microbiological criteria and pesticide residues' insufficient alignment with the WTO SPS Agreement and other international standards and practices are the source of many difficulties. Inspection results or border control findings in agricultural products and plants continue to create obstacles to trade on a daily basis. Several Member States are targeted by specific measures of Russia e.g. on chilled meat, on suspension of exports from categories of producers while certain bans are imposed EU-wide after findings of non-compliance in certain Member States. These import constraints are also negatively affecting retail and wholesale operations and hinder an efficient supply chain management. Since March 2012, restrictions on imports of cattle and ruminants (due to Schmallenberg virus) as well as on live pigs for slaughter are in place.

In the Customs Union (CU) framework, Russia adopted regulatory processes of alignment of its SPS technical regulations with the international standards and practices. The EU submitted a list of requests for harmonisation to the CU partners. However, so far there has been no evidence of the implementation, except in the field of pesticides.

In the area of technical barriers to trade (TBT), EU economic operators still face numerous horizontal and sector-specific barriers to trade in Russia due to burdensome technical regulations, non-transparent application of requirements, coexistence of several, partly overlapping and excessive certification, conformity assessment and authorisation procedures, which largely remain incompatible with modern international rules and standards.

Technical regulations are now adopted at the level of the Eurasian Customs Union (Russia, Belarus, Kazakhstan). Often these technical regulations are not based on international standards and establish overly burdensome certification, notification and labelling

requirements. Recent examples include the Customs Union technical regulation on safety of consumer goods and goods destined for children and adolescents (amongst others relevant for textiles, clothing and footwear) and the Customs Union draft technical regulation on alcoholic products safety. Additionally, since detection on 24 January 2014 of African Swine Fever (ASF) in wild boar close to the Belarusian border, the Russian Federation has de facto banned the export of live pigs and pork products from the entire EU territory. This measure appears as disproportionate and unfounded.

3. New important barriers that have emerged in 2013

EU exports of spirits and wine were confronted with a new market access barrier as Chinese authorities decided in February 2013 to test or ask for the results of tests of phthalates content in those products. The main concern is that these exported products are compliant with EU legislation and efficiently protecting consumer health and safety in Europe. Meanwhile, the Chinese authorities have reduced the requirements of testing for each consignment. However, China has not yet finalised their risk assessment in order to set up a legal limit to the phthalates in foodstuffs.

Moreover, in June 2013 China started an anti-dumping as well as an anti-subsidy investigation on wines imported from the EU. The Commission is closely following the ongoing investigation and will do its utmost to prevent the imposition of unjustified anti-dumping or countervailing measures on EU wines.

In India, the customs duty on new high end cars has been increased from 75% to 100%, together with an increase of the duty on new motorcycles with an engine capacity of >800ccm from 60% to 75%. These measures, along with increases in import duties on other products, appear to be following a more general policy line that is difficult to reconcile with India's political commitment in the G20 to refrain from the adoption of any protectionist measure.

Also, new interpretation and implementation of food labelling requirements by India is the reason for a large number of imported food consignments being blocked. The announced new approach means that labelling information has to be printed in the country of origin on the original package and not anymore by means of a sticker, and only India-specific information can be provided on a sticker affixed in customs warehouses.

On 1 April 2013, the Japanese Forestry Agency introduced the "Wood Use Points Program" ("WUPP") which results in discriminatory treatment of imported wood towards domestic wood species. Under this initiative, participating consumers who purchase new homes built with a minimum of 50.1% of local wood products will be eligible to receive up to 300.000 Wood Use Points (with an equivalent value in Yen, corresponding to up to EUR 2.250), which can be redeemed through the purchase of specified local forestry/agriculture/fishery products.

So far only Japanese wood species have been approved while all the applications submitted for foreign species including from Sweden, Austria and Romania have been rejected. On 17 October 2013, the Forestry Agency adopted new Guidelines specifying the criteria of eligibility under the program.

4. Conclusions

This report underlines again that barriers to access the markets of the EU's strategic partners continue to persist in various ways. However, a number of recent positive developments suggest that progress is underway and that the EU's Market Access Strategy is delivering on many fronts. Nevertheless, new barriers are emerging constantly and the EU will continue to monitor these markets very closely with a view to applying a successful and targeted removal strategy.

Together with our ambitious bilateral negotiation agenda which includes all our strategic partners, the Market Access Strategy remains crucial to make sure that concluded bilateral agreements are translated into real trade flows on the ground. The close cooperation between the Commission, EU Delegations, Member States and business both in Brussels and in third countries has once again proven to be an efficient tool. This partnership element of the Market Access Strategy should be strengthened further.

To step up efforts to remove trade barriers in third countries, the Commission will not hesitate to continue using all available tools under the Market Access Strategy, including trade diplomacy, use of high level bilateral events as well as of WTO Committees and the enforcement of third party commitments via well-targeted dispute settlement proceedings.