



EUROPEAN UNION  
DELEGATION TO THE UNITED STATES OF AMERICA

Trade and Agriculture Section

Washington, 19 May 2011  
TRADEAGR/MS/mcvl/D(2011)1485

**Subject: EU Trade Counsellors Meeting on US Trade Barriers**

### Summary

The objective of the meeting was to discuss possible improvements to the functioning of the Market Access strategy and to update the existing trade barriers list. There was broad agreement on a more assertive approach on U.S. barriers. The barriers list should also better indicate the follow up for each barrier. Moreover, the electronic market access database should be amended by the most recent developments. Both the Commission and the MS should more frequently raise trade barriers with their U.S. counterparts on the basis of the agreed hymn sheets and report on the feedback and results. The EU should also consider a more comprehensive approach of linking trade barriers from different sectors as trade-offs in order to reduce the number of barriers. Delegation also gave a specific overview of SPS barriers.

### Detail

#### **COM Market Access Strategy – ideas for improvement**

On the Market Access Strategy in general, Spain argued that the U.S. markets are becoming more closed while the EU has become softer in pursuing trade barriers, and the results are questionable. For instance, the TEC used to deal with market barriers but this is not the case anymore – Delegation noted that it had been a deliberate policy choice following the negative fall-out from the U.S. using the TEC as a trade barriers settlement mechanism. Spain also suggested that EU should resort more to reciprocity if the U.S. was not forthcoming in opening its markets. The EU should have a new market access strategy; for example the existing market access data base had only 59 barriers to trade – some of which should not be there - and the EU was not using the right dialogues. The data base did not seem to be updated frequently and contained old information. The data base did not show how the trade barriers were addressed and what follow up they had been given. The past U.S. Trade barriers report was a better tool to follow up the trade barriers than the current one. Perhaps the EU should establish a specific "watch list" to high-light the key barriers. France suggested that the trade barriers list should be kept relatively short and focused on the most important topics.

The Netherlands also encouraged the Commission to "bite harder" in selective cases identified as key market barriers. Denmark suggested that the EU also work closer with other countries, e.g. Canada. Delegation noted that it was already the case where we have

common interests – with Canada, for instance, our interests are not always convergent. It was also underlined that the Market Access Strategy is an EU strategy where both the Commission and the Member States are expected to raise issues with the U.S.

Hungary called for changing the tone when addressing U.S. trade barriers. The tone should be more attuned to the negative impact they create for the EU business. For example, the Buy America legislation ought to be referred to as the "federal prohibition of buying foreign products", or something similar.

France called for greater information sharing from meetings with US counterparts between the Commission and Member States. Luxembourg suggested that the EU could possibly link barriers from different sectors as trade-offs.

### **Updating US Trade Barriers List**

Delegation reminded that the selection of the key trade barriers should be based on their economic and systemic importance and political feasibility. Furthermore, the defensive interests of the EU should also be considered. In addition to the comments made in previous meetings, the following inputs were noted.

With respect to Buy America, the extensive market access barriers to the US rail sector were particularly mentioned by Spain and France. Buy American provisions are being applied more stringently and restrictions cover now practically all mass-transit. In addition, the Obama Administration has adopted a *de facto* policy of not granting any waivers to the mass-transit exemption. To date, three Spanish companies have expressed their complaints regarding these restricting measures. The UK has raised the attention to eight legislative proposals introduced in Congress to implement more far-reaching Buy American provisions. Although the Bills not seem to be like to pass in the near future, they are indicative of rising protectionism on the Capitol Hill.

Hungary argued that U.S. violations to the WTO Government Procurement Agreement, in the form of exemptions, should be added to the list. In particular the database should highlight which U.S. states and companies that are exempted, even though it was not question of illegality in the terms of WTO law. Hungary also wished the Commission addressed the US law preventing some EU countries citizens, along with HU citizens, from applying for E1 Trader and E2 Investor visas. This creates a non-tariff barrier between the U.S. and the relevant EU countries since this restriction makes almost impossible for them to sell their products in the U.S. market. Furthermore, Hungary mentioned that the U.S. did not accept the CE mark on certain products and requires additional certification from EU companies which also creates difficulties, especially for European SMEs.

All suggestions that were made have been included in the annexed market barriers list that is circulated among Member States for possible further comments. The general suggestions for improving the Market Access Strategy would be communicated to the Commission in Brussels.

### **SPS Issues and Trade Barriers List**

Delegation explained that while the EU and the U.S. have a good bilateral cooperation in matters of public health and consumer protection, there are several longstanding trade issues in respect of food safety. Examples of such cases include the slow procedure on

applications to allow import of new types of plant products, U.S. violation of OIE guidelines on importation of bovine animals and products, restrictive legislation on importation of pasteurised milk, and the new Food Safety Modernization Act (signed January, 2011) which lacks clarity regarding many important issues such as certification and product standards.

One positive development is the initiation of a bilateral comparability pilot project concerning testing methods to determine the safety of bivalve molluscs. If successful, the pilot project has potential to apply to other food safety issues, such as trade in pasteurised products.

**List of key market access barriers in United States of America amended by new barriers according to MSs Suggestions**

Barrier	Description
Anti-dumping measures: practice of zeroing	<p>By means of zeroing, the US has consistently inflated amounts of anti-dumping duties by disregarding non-dumped transactions. The US has been condemned several times by the WTO Appellate Body but has so far not complied, most crucially in the case of annual reviews, which determine 90% of the duty collection in the US system. Furthermore, the US has so far refused to correct an obvious calculation error against an EU company.</p> <p><b>UK</b> suggested a reflection on the December 2010 Commerce proposal trying to resolve the issue, however the UK still have concerns because it does not bring the US into full compliance with the WTO ruling.</p>
Trade and security: 100% scanning	<p>The Container Security Initiative was introduced in 2002 to counter potential terrorist threats to the international maritime container trade system. The CSI consists of four elements: security criteria to identify high-risk containers; pre-screening containers before they arrive in U.S. ports; using technology to pre-screen high-risk containers; and developing and using smart and secure containers. According to EU industry, the CSI screening and related additional U.S. customs routines are causing significant additional costs and delays to many EU shipments.</p>
Lacey Act - Scope and implementation of the US legislation to combat illegal logging	<p>In 2008, the Lacey Act was amended to extend its scope to all plants, including timber or associated wood products with the objective to combat illegal logging. The amendment added a new requirement for an import declaration, which will oblige importers of covered plants and plant products to list shipment information along with information such as plant scientific name and country of harvest to prove compliance with the Lacey Act requirements. Whilst we share with the United States the objective of contributing to the fight against illegal logging, the practical application of certain new requirements may be problematic for exporters of forest products from the EU to the US. We also consider that the scope is wider than it need be. In these circumstances we consider it important to continue to address these aspects with the US authorities.</p>
Procurement: Buy American	<p>In the field of public procurement there are federal restrictions on the use of federal grant money by State and local government. These restrictions are called 'Buy America' which covers a significant proportion of public purchasing in the U.S.</p> <p><b>ES and F:</b> problems in the railway sector, US has created relevant hurdles for EU companies to engage in the railway sector in the US. Three Spanish companies have complained about huge market loss because of the Buy American rules in this sector.</p> <p><b>UK:</b> Eight new bills introduced in Congress that include Buy America provisions.</p> <p><b>HU:</b> Suggested that instead of Buy America which does not clearly show the restrictiveness of these measures, it is worth considering using another description for these provisions (i.e. Measures restricting the purchase of foreign products in the US.)</p>
Services: 100 % collateral requirement on reinsurance business and discriminatory tax treatment	<p>The current requirement for non-U.S. reinsurers to post 100% collateral for their U.S. acceptances is both discriminatory and technically unjustifiable in the modern age. In December 2006, the Reinsurance Task Force of the National Association of Insurance Commissioners endorsed the principle of a move away from the current discriminatory reinsurance collateral requirements for non-U.S. reinsurers towards a system where collateral is charged for all reinsurers regardless of origin on the basis of a credit rating established by a ratings organisation. Legislation is currently also under consideration in the U.S. Congress (H.R. 6969) to raise taxes on US foreign-owned insurance companies, by denying US tax deductions on reinsurance cessions to affiliated reinsurance companies outside the US.</p>

	ES does not longer consider this as a major barrier.
Aviation: ownership restrictions and foreign repair stations	<p>U.S. law requires U.S. airlines to be under the actual control of U.S. citizens in order to be licensed for operation. For airline corporations, 75% of the voting interest must be held by U.S. citizens and two-thirds of its board of directors must be U.S. citizens. The EU-US Air Transport Agreement, which entered into force in March 2008, refers to further investment opportunities as one of the objectives for second-stage negotiations.</p> <p>Regarding the security certification of foreign aeronautical repair stations, the Federal Aviation Administration (FAA) was prohibited from issuing new foreign repair station certificates unless the Department of Homeland Security's Transportation Security Administration (TSA) issued its final repair station security rules by 3 August 2008. As the TSA failed to meet this deadline, foreign repair stations can not be certified unless the repair station was previously certified and up for renewal or is already in the process of certification.</p> <p>Both airline ownership conditions (or at least the interpretation of the notion 'actual control') as well as rules regarding foreign repair stations risk being tightened further in the context of the review of the FAA Reauthorisation Acts, which serves to authorise the FAA's budget, but which is also used as a vehicle to modify existing rules governing aviation.</p>
FDI limitations imposed by the CFIUS / FINSA framework	<p>The Foreign Investment and National Security Act of 2007 ('FINSA') amends the so-called Exon-Florio amendment of the Defense Production Act of 1950, which authorises the US President to investigate foreign acquisitions, mergers, and takeovers of, or investments in, US companies from a national security perspective. In 2008, final regulations that implement FINSA were published. These regulations complete the reform of the Committee on Foreign Investment in the United States ('CFIUS'), an inter-agency committee chaired by the US Treasury to which the US President's review and decision-making authorities provided by the Exon-Florio amendment have been delegated. Only an examination of CFIUS' practice will allow for a full appreciation brought by the FINSA implementing regulations.</p> <p>Important concerns remain regarding the economic and legal cost associated with the CFIUS process, as well as the lack of predictability and legal certainty of CFIUS' deliberations and decisions.</p>
IPR: insufficient protection of GIs	<p>Difficulties to protect their rights and the continuing misuse of EU geographical indications on food and drinks produced or sold in the U.S., especially in the wine sector and for foods, such as cheese and meat products, is a source of considerable frustration for EU producers. Particularly problematic is the fact that the U.S. still considers a number of European wine names as 'semi-generics'. U.S. producers making use of 'semi-generics' can take advantage of, or could damage, the reputation of the Community geographical indications in question.</p>
Slow procedures on applications to allow import of new types of plant products	<p>The IPPC has set a standard on the framework of PRA. According to ISPM 2, 'where other contracting parties are directly affected, the NPPO should, on request, supply information about the completion of individual analyses, and if possible the anticipated time frame, taking into account avoidance of undue delay.' However, Pest risk analysis, PRA, is not conducted within a reasonable time frame for neither fruits &amp; vegetables nor plants in growing media.</p>
United States- Bovine animals and products	<p>OIE has set guidelines for which products should be covered by import legislation, based on the BSE-risk status in the country of origin (Terrestrial Animal Health Code, Article 11.6.1.). WTO members should follow the OIE code, including the latest modifications made in the 77th General Session of the OIE (24-29 May 2009). US import restrictions include more products than necessary.</p>
Food Safety <i>ES, FR suggestion</i>	<p>New legislation can create hurdles especially for SMEs.</p> <p>Old existing issues:</p> <ul style="list-style-type: none"> <li>• Beef hormone issue (limited results have been achieved)</li> <li>• Opening market for fruits and vegetables</li> <li>• Wine tax issue</li> <li>• Pasteurised dairy products</li> </ul>
Online Gambling <i>UK suggestion</i>	<p>Several EU companies are under criminal investigations in the US, although they had left the market following the entry into force of the Unlawful Internet Gambling Enforcement Act end of 2006.</p>
Discriminative Measures	<p>US law preventing some EU countries' citizens, including HU citizens, from applying for EI</p>

regarding E1 and E2 visas <i>HU suggestion</i>	Trader and E2 Investor visas.
US compliance issues with the WTO GPA <i>HU suggestion</i>	Not all US states have joint the WTO Government Procurement Agreement which creates hurdles in the Trans-Atlantic economic relations.
CE mark equivalency issues <i>HU suggestion</i>	The US did not accept the CE mark on certain products and requires additional certification from EU companies which also creates difficulties, especially for European SMEs.
Dodd-Frank Act <i>NL suggestion</i>	?
Foreign Account Tax Compliance Act (FATCA) <i>NL suggestion</i>	According to newly proposed U.S. Treasury Code Sections, effective for payments after December 31, 2012, all foreign financial institutions (FFIs) will be required to enter into disclosure compliance agreements with the U.S. Treasury, and all non-financial foreign entities (NFFEs) must report and/or certify their ownership or be subject to the same 30 percent withholding. This new reporting and withholding regime will ultimately impact current account opening processes, transaction processing systems and "know your customer" procedures utilized by foreign banks thus creating administrative hurdles and additional costs.
Jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) <i>NL suggestion</i>	The legislation creates legal uncertainty, extra administrative hurdles and cost for companies acquiring U.S. operations.