

Briefing for Executive Vice-President Dombrovskis

Scene setter

The meeting takes place at the request of BusinessEurope. They aim to have an introductory discussion with you given your new responsibilities and they aim to address the topics indicated below. Please note that BusinessEurope has also submitted various position papers, as summarized below (copies in attachment), including very recently on the Trade Policy review.

“Open strategic autonomy”: BusinessEurope will bring a strong message on the importance of **open markets and trade**, and enquire how the European Commission intends to implement “open strategic autonomy”. They have been quite vocal in underlining that resilience can also be achieved through diversification.

Relations with the United States; BusinessEurope is eager to resolve the current disputes and refocus on a positive agenda on WTO reform, trade and technology, and cooperation on climate and labour issues. More specifically, they will likely raise the Airbus-Boeing dispute and the imposition of EU's countermeasures and enquire into your views on the next US administration.

Relationship with China; In line with the EU's view, Business Europe advocates a strategic reorientation, namely a more assertive and firm approach aimed at levelling the playing field and restoring EU competitiveness.

Mercosur Agreement; BusinessEurope sees the agreement as critically important and would like to learn more about on-going activities to achieve ratification. They have already spoken out in favour of the agreement and should be encouraged to continue to do so.

EU's digital trade agenda; Business Europe is generally supportive of the EU's digital trade agenda, both in bilateral and the WTO e-commerce negotiations. However, they strongly criticised the EU's approach to cross-border data flows for lacking ambition in a letter to Commissioner Hogan sent earlier this year. Moreover, Business Europe is concerned with the **Schrems II judgment** (July 2020, Court ruled the EU-US Privacy Shield invalid with immediate effect). As representative of companies rely extensively on personal data transfers, they have already called for legal certainty and urgent guidance from the European Data Protection Board at a September industry roundtable attended by Commissioner Reynders.

Trade and Climate initiative in the WTO; BusinessEurope is favourable to the initiative, notably about enlarging the initiative beyond **goods to include also trade in services, non-tariff barriers, standards and rules in key areas like Intellectual Property**. They will be interested in learning further details on our initial considerations and how we see this links to other initiatives such as the Environmental Goods Agreement or the New Zealand-led Agreement on Climate Change, Trade and Sustainability (ACCTS).

Commission's new focus on implementation and enforcement; BusinessEurope has been very supportive of the Commission's new focus. Its recent position paper calls for a comprehensive enforcement strategy that makes opportunities more tangible (more granular and timely information for suppliers of goods but also services) and builds a positive agenda with trade partners, (2) ensures better coordination between different initiatives within the Commission (e.g. customs action needs to go hand in

hand with trade policy), and (3) safeguards European interests by ensuring EU partners comply with their commitment.

BusinessEurope is about to finalise its contribution to the Trade Policy Review. In the recent past they have issued position papers (please see attached) on:

- Their latest position paper is one the **implementation of FTAs**. The paper makes concrete proposals on how to maximise the benefits of our agreements, for instance by simplifying the processes for companies to benefit from preferential tariffs, providing information to small and medium-sized enterprises, making EU and national outreach activities more impactful, in cooperation with stakeholders; and making sure that the EU's Chief Trade Enforcement Officer pursues a proactive agenda.
- **What Trade can do for Climate** (in short: via reviving the EGA, disciplines on industrial subsidies at WTO level, harmonising standards on green goods, tariff reductions for environmental goods in FTAs, strengthening the enforceability of TD chapters, but not via sanctions, green procurements, very prudent support to CBAM.)
- **Smart Technological Sovereignty** (in short: *"technological sovereignty has been interpreted in a restrictive and protectionist manner by some of Europe's major trading partners. If the EU follows suit with a reactive approach to trade policy and misuses the concept of technological sovereignty, it runs the risk of serving protectionist interests and will ultimately undermine the benefits of global trade and investment"*.)
- **EU-US**: How to build a positive agenda (in short: establish a formalised platform for high-level strategic dialogue; take a sequential approach to trade negotiations, starting with tariffs on all industrial goods and progressively expanding in case of success to including areas like agriculture, public procurement, services, and investment; enhance their regulatory cooperation; jointly take the lead in setting new rules on a variety of topics such as industrial subsidies, state-owned enterprises, forced technology transfers, developing country status, dispute settlement; achieve an ambitious e-commerce agreement...)
- **The EU and China**: Addressing the systemic challenges: BusinessEurope advocates a strategic reorientation of the EU relationship with China, namely a more assertive and firm approach aimed at levelling the playing field and restoring the competitiveness of the EU industry. After years of failed structural reforms and a further consolidation of the Chinese state-led economy, Europe should wake up to the China challenge and upgrade its own toolbox. Rebalancing is key.
- **Foreign Economic diplomacy and sanctions** (in short: oppose the weaponisation of the sanctions policy and the use of such measures to pursue economic interests; support a more assertive approach by the EU to protect its sovereignty in economic diplomacy).

Attachments: BusinessEurope position papers on: Trade policy review, Implementation of FTAs, Trade and Climate, Smart technological sovereignty, EU and US, EU and China and Foreign economic diplomacy and sanctions. OPEN STRATEGIC AUTONOMY

Objective

To provide an update on the on-going trade policy review and to reiterate the Commission's view that the EU needs to be open, while assertively standing up for its rights and setting its own course.

Line to take

On the trade policy review and upcoming Communication

- We need to set a new trade policy direction to help us to identify the responses to the global challenges, and takes into account the lessons learned from the Covid crisis.
- It will also need to manage and develop our key relationships, in terms of specific relationships it is clear that beyond the US and China, there will be a need for a specific focus on our relations with Africa and the Neighbourhood because of their strategic value.
- We welcome your contribution. The input from the public consultation will feed into the Communication on trade and investment policy which will be adopted early next year.

Concept of Open Strategic Autonomy

- The trade policy review should in particular help us to further define the model of "Open Strategic Autonomy".
- The EU stands for open and free trade, international cooperation and multilateralism, but it needs to be assertive in pursuing its interests.
- We have therefore come up with this concept to underline the need for openness and international cooperation. We shall also react to the calls for self-sufficiency and autarky which cannot be the solution out of the crisis.
- I agree with you that we should build our open sStrategic autonomy with like-minded countries and relying on our network of FTAs.

Defensive points

What type of Communication are you aiming for and how will it compare with the Trade for All Communication?

- We are aiming for a focussed and concise Communication outlining the broader indications on the “why” and “what” of trade policy. This will likely also contain some headline actions, but we do not expect to replicate the “action-plan” type of the Trade for All Communication.

How can the EU ensure greater resilience of supply chains?

- The resilience of supply chains was tested during the crisis for Covid-19 products.
- We need a fact-based discussion on what vulnerabilities and dependencies really consist of, and how can they be addressed. We have recently launched some work in this regard internally - also some studies have been looking into this recently. And indications are that the EU is actually much less dependent than one may think:
- One such study (Prof. Felbermayr, Kiel Institute of World Economy) looking at 5000 products imported into the EU found that only 26 products come from 1 single supplying country only.
- 80 products out of 5000 come from 3 supplying countries (representing 350 million USD - raw materials, chemicals, uranium and some specialised agricultural products such as live goats).
- However 91% of EU products are imported from at least 10 countries. This represents 99.3% of the EU's import value.
- So the EU is actually not very vulnerable to dependency.
- And we should not forget that the EU is also the main exporter of Covid-19 related goods: the EU was responsible for 50% of all such exports. Among the 30 biggest exporters of Covid-19 goods, there were 10 EU countries, Germany being the number one exporter (even larger than China and the US).

EU-US trade relations

Objective(s)

- Outline your ideas on engagement with next US administration and the priorities for the short-term to medium-term period.

- [REDACTED]

Line to take

Future of the EU-US trade

- We very much looking forward building transatlantic agenda with President elect Biden. I am confident that this important relationship will improve. We will take necessary actions to improve bilateral relations and co-operation on important international issues.
- At the same time, we recognize that there will be a pressure to pursue a more domestic focussed agenda in the US. Many US positions are bi-partisan.

- [REDACTED]

- [REDACTED]

Civil aircraft dispute

- [REDACTED]
- The \$7.5 billion duties on EU exports have caused almost a 50% drop of imports of the targeted EU products, hitting mainly the three Airbus Member States, but also Italy.¹

¹ The impacts of US Airbus measures were calculated for the period between November 2019 and August 2020, compared to the same period in the previous year.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Digital services taxes (DST) investigations

- The Section 301 investigations into digital services taxes against the EU and certain Member States (Austria, Czech Republic, Italy, Spain) in addition to the 2019 probe against France is problematic and we will need to work with the US to find a solution.
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Defensive points

[REDACTED]

[REDACTED]

Civil aircraft

What do you think about the US statement that it will increase its additional duties on imports from the EU, if we apply countermeasures?

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Future of trade relations with China

Objective(s)

Offer an outline of the future of the trade relation with China

Line to take

- The need for a more balanced and reciprocal economic relationship has become increasingly evident in the last years. As a result, our China policy has shifted towards a combination of bilateral engagement and autonomous measures.

Bilateral engagement

- [REDACTED]
- [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Autonomous measures and agenda

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Defensive points

Has there been any progress in CAI dealing with investment protection and investor to state dispute resolution. Will CAI include the reformed EU approach to investment protection?

- The political priority set for CAI (EU-China Summit Statements from 2019 and 2020) is to rebalance the market access asymmetry and to level the playing field; as well as to include meaningful outcome on sustainable development.
- [REDACTED]

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ion.

EU-Mercosur

[REDACTED]

[REDACTED]

Line to take

- The Agreement represents a major foreign policy achievement and a strong joint signal in support of rules based international trade and stable and predictable international relations.
- The deal will provide EU firms real market access and unlock sizable benefits, including in areas like automotive or machinery, where the EU is a global leader.

- [REDACTED]

- [REDACTED]

- [REDACTED]

[REDACTED]

- [REDACTED]

- My services would be happy to assist you in identifying possible partners or in establishing contacts, in particular in Brazil.

Defensive points

[REDACTED]

What action can the Commission take to improve the European public opinion towards the Mercosur Agreement?

- We already have a Regulation to prevent the entry into the EU of illegally harvested timber. As set out in the Green Deal the Commission intends to bring forward a legislative proposal next year with the aim of ensuring EU demand of other commodities does not originate from deforested areas.

- [REDACTED]
- [REDACTED]
- [REDACTED]

EU's digital trade agenda

Objective(s)

- Confirm that the Commission wants to maintain an ambitious Digital Trade agenda, including on data flows

Line to take

On Digital Trade and data flows in trade agreements [if raised]

- The EU is fully committed to maintaining an ambitious Digital Trade agenda in its bilateral negotiations, as well as in the e-commerce negotiations in the WTO.
- Accordingly, we argue for rules in our negotiations that respond to the challenges of the digital economy and counter protectionist measures such as data localisation requirements, prohibitions of cross-border data transfers, or forced transfer of source code.
- The EU attaches particular importance to advancing the negotiations on e-commerce in the WTO. These negotiations have the potential to deliver global rules on e-commerce and demonstrate that the World Trade Organisation can catch up with business reality.

- It is clear that data flows and data protection will be among the most sensitive and difficult issues in the WTO negotiations and are likely to require time to discuss. Nevertheless, the EU wants these issues to be part of the negotiation package.

On the EU's digital and data policies

- On the EU internal front, the Commission has recently issued a number of policy documents, including a Data and a Digital Strategy as well as an initiative on Artificial Intelligence [February 2020].
- These policy documents are now followed up by legislative proposals, under the leadership of Commissioner Breton.
- Overall, the main objectives of these initiatives can only be supported, e.g. to improve the availability of data for business in the EU.

- [REDACTED]
- [REDACTED]

Defensive points

What is the EU position on data flows?

- The EU attaches great importance to addressing protectionist measures related to data flows and data localisation. We are very concerned about the increasingly alarming trend of new obligations that force companies, for example, to store and process personal and industrial data in a given country.
- WTO negotiations on e-commerce provide us with a unique opportunity to tackle these challenges at the global level and we look forward to working with other Members to develop a language that could be acceptable to as many participating Members as possible.
- In this respect, the EU has tabled a text proposal that aims to facilitate data flows and ban all forms of data localisation requirements (by far the most common protectionist barrier when it comes to data flows). Our proposed text also ensures that Members retain the right to safeguard the protection of personal data and privacy, which are fundamental rights in the EU.
- It is clear that discussions on data flows/data protection will be difficult and will take time. But these issues need to remain part of the e-commerce negotiation package.

SCHREMS II - Judgement of the European Court of Justice

Objective(s)

- Inform about the Commission's follow-up to the Schrems II judgment

Line to take

- Our priorities following the judgment are threefold.
- First, ensuring that the data of Europeans are adequately protected when transferred outside the EU, in full compliance with the judgment of our highest court.
- Second, ensuring that companies can rely on solid transfer mechanisms. That is what companies rightly expect, as they need to transfer data as part of their daily operations.
- Third, ensuring a coordinated and consistent application of the judgment throughout the EU.
- To reflect these objectives, work focusses on three main areas.
- First, as you know, we have initiated discussions with the US authorities to explore a new, improved framework. Of course, this will not be a "quick fix" as we need sustainable solutions that deliver legal certainty in full compliance with the judgment.
- Second, we are finalising the modernisation the Standard Contractual Clauses (SCCs), in order to align them with the General Data Protection Regulation (GDPR) and adapt them to the realities of today's digital economy. We are also integrating clarifications provided by the Court, to assist companies with their compliance efforts.
- Because the SCCs are so widely used and are particularly useful for smaller businesses, finalising this work is a top priority for us. As soon as we publish the draft SCCs we will organise a virtual event to seek feedback from business organisations. This will be key to to understand your needs and learn from your experience on the ground
- Thirdly, we are working closely with the Board on its guidance on the Schrems II judgment. This is essential also to ensure our work on the SCCs complements the upcoming guidance, and vice versa.
- We will encourage such guidance to be, as much as possible, operational, based on practical steps and concrete examples.

Defensive points

There is no guidance, companies do not know how to comply with the judgment.

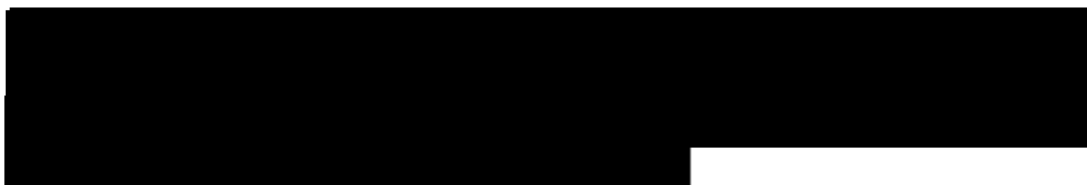
- We understand that there is a need for guidance and have urged the European Data Protection Board to accelerate its work on this. It is essential that there is a uniform interpretation and approach across the EU, and this can only be provided by the Board.

There should be an enforcement moratorium.

- Such an enforcement moratorium is not possible under the General Data Protection Regulation (GDPR). This has also been made clear by the data protection authorities in public statements in the past.
- Data protection authorities have discretion when it comes to launching ex officio investigations, but are required to act when receiving complaints from individuals. As you probably have seen, several complaints have already been lodged by civil society that are currently being looked at.
- Some key steps that companies can take include mapping their data transfers, carrying out risk assessments, where necessary implement additional safeguards, etc.
- And of course, all of this should be properly documented to demonstrate due diligence if it comes to a dialogue with a data protection authority.

What is the US position?

- Finding solutions critically depends on the US authorities, as the best experts of their legal system. Only they can judge what is possible, both legally and politically, for example when it comes to creating a redress mechanism that fulfils the Court's requirements in terms of independence and binding powers.

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Possible Trade and Climate initiative in the WTO

Objective(s)

- Inform about the start of the reflection process on a possible trade and climate initiative in the WTO.
- Explain that initiative should focus on facilitating trade in goods and services for climate mitigation but should also encompass other areas such as development, transparency around domestic measures.
- Inform that DG Trade will be organising a dedicated civil society meeting for this initiative in the beginning of December.

Line to take

- The EU is fully engaged on the sustainability in the WTO and greening forms an important part of it in line with the objectives of the European Green Deal. We want an ambitious agenda and an ambitious outcome on environments in MC12.
- In this respect, I have announced a possible WTO Trade and Climate initiative. It should focus on facilitating trade in goods and services that mitigate climate change but also encompasses other building blocks such as development, transparency of domestic measures (e.g. for the EU transparency around carbon border adjustment mechanism) or solidifying the role of WTO committee on Trade and Environment.
- This new initiative will take into account the lessons learned from 2016 negotiations on the Environmental Goods Agreement and therefore require a re-orientation of our approach, as suggested in your paper².
- We have started a reflection on the focus and scope of this initiative. We will consult both internally and with like-minded WTO Members. We are also planning a dedicated Civil Society meeting in the beginning of December. I invite you to share your views.
- These discussions over the next few months will inform our concrete proposal and define the next steps to take it forward.

² https://www.buinessurope.eu/sites/buseur/files/media/position_papers/rex/2020-06-22_what_can_trade_can_do_for_climate_0.pdf

Defensive points

How does this new trade and climate initiative relate to Environmental Goods Agreement?

- Despite all EU efforts, it was not possible to reach an agreement on the Environmental Goods Agreement in December 2016. Those negotiations had been put on hold. We are not proposing to relaunch them, but take into account the lessons learned.
- [REDACTED].
- This work should allow integrating initiatives and ideas presented by other WTO Members on various topics. Ultimately, all the efforts should come together in a manner that attracts a large number of WTO Members.

[REDACTED]

[REDACTED]

[REDACTED]

Chief Trade Enforcement Officer (CTEO), Enforcement and FTA Implementation

Objective(s)

- Demonstrate to this important business association that the Commission's renewed focus on enforcement and implementation of trade agreements, a long-lasting political priority, is also now firmly set in motion
- [REDACTED]
- Signal that BusinessEurope should share more concrete thoughts on its role in an enhanced partnership on implementation & enforcement as coordinated by the CTEO

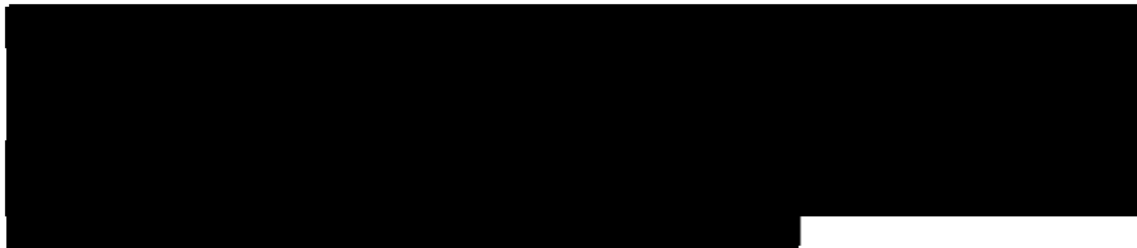
Line to take

- The EU trade policy approach for the post-coronavirus global economy is called: "Open Strategic Autonomy". It means *inter alia* building stronger alliances with like-minded partners; it also means shaping a better type of globalisation – fairer, and more sustainable.
- The EU's **network of preferential trade agreements** can play a key role in helping rebuild the EU economy by driving export performance, building resilience and diversifying supply chains.
- Under this Commission, we are strengthening our implementation and enforcement agenda across our worldwide relationships. The recent appointment of a **Chief Trade Enforcement Officer** (or "CTEO") testifies to the EU's resolve in this regard.
- The increased focus on implementation and enforcement piloted by the CTEO will help our importers and exporters gain more value from our trade agreements. This includes initiatives benefiting small and medium-sized companies (SMEs). For instance, we have last month launched a new online and multilingual portal "**Access to Markets**" offering practical export and import information to companies, notably SMEs, to help them navigate EU trade agreements.
- Under the CTEO, we are also **markedly stepping up** our enforcement efforts to counter protectionism and trade barriers for our companies on non-EU markets, but also to address **alleged breaches of commitments on trade and sustainable development** in EU agreements, notably on the **climate action agenda or labour rights** in partner countries.

- This include setting up in the Commission of a new **streamlined complaint system**, the Single Entry Point (SEP), in DG Trade that will allow companies and stakeholders to bring complaints on trade barriers on non EU markets, as well as on alleged violations of commitments on trade and sustainable commitments.
- The Commission has adopted recently its **4th Annual report on FTA implementation** with more information on different aspects of trade agreements that you will be interested in. It cover many of the issues BusinessEurope has been interested in, including services, public procurement and intellectual property rights.
- With our increased focus on implementation and enforcement, also comes the **responsibility for business to step up efforts to provide the evidence needed** to identify and eliminate alleged trade barriers.

Background notes

RELATIONS WITH THE UNITED STATES



BusinessEurope report "*EU and USA – How to build a positive agenda*" published on 13 July 2020 calls on the EU to build a coherent and proactive strategy towards the US involving both the bilateral and multilateral trade dimensions. On the bilateral front, BusinessEurope invokes the establishment of a permanent formalised platform for high-level strategic dialogue, on the model of similar platforms in place with China and Japan. In terms of concrete actions, BusinessEurope suggests engaging in trade negotiations with the US in a sequential approach starting with industrial goods tariff elimination, the expansion of conformity assessment and the enhancement of regulatory cooperation notably on digital issues; in addition, the EU and US should formalise a bilateral dialogue on services, investment and FDI screening. On the multilateral front, the BusinessEurope report is very supportive of the EU's approach to WTO reform and suggests areas of joint EU-US work, including on level playing field, e-commerce, export controls, special and differential treatment and dispute settlement. The report is critical of the managed trade approach embodied in the Phase 1 US-China agreement and of the unilateral tariff measures adopted by the US on the basis of Sections 301 and 232, as well as of unilateral export control measures. BusinessEurope calls on the EU to take a cautious approach in relation to broader policy measures such as the carbon border adjustment or digital tax initiatives recalling their strong trade dimension. Finally, the report supports reinforcing the EU's assertiveness at global level through the revision of the Enforcement Regulation and the creation of the Chief Trade Enforcement Officer.

RELATIONS WITH CHINA

EU-China trade relations entered a new phase in 2019 with the EU openly recognising China as a 'strategic rival' and 'economic competitor' in addition to a "cooperation partner". This reflected a growing realisation of the need to better deal with the challenges of China's state-led economic model – its rampant subsidisation, its aggressive pursuit of the objective of becoming the global leader in major economic sectors and its use of measures such as forced technology transfers. The EU-China relationship has however become further affected by more recent developments including the COVID-19 pandemic and events in Hong Kong.

The EU priority is to push for transparency, reciprocity and a balanced trade and economic relationship since China is the EU's most trade-restrictive major economic partner, holding the highest stock of recorded trade and investment barriers.

Against this backdrop, on 22 June 2020 the EU and China held their annual Summit by video-call, followed up by the Leaders' call of 14 September. On both occasions,

Bilaterally, our key area of engagement is the negotiation of a Comprehensive Agreement on Investment. Negotiations have gathered considerable pace and political visibility in the last year, in view of the objective of concluding by end of 2020. It remains to be seen if a deal by year-end is politically feasible.

Establishing and maintaining working relations – including at political level - will be a critical factor in our relationship with China.

At the same time, the EU should continue to deliver on the actions outlined in the Communication on EU-China relations published in March 2019: in parallel with continued engagement with China, the EU should strengthen its toolbox of autonomous measures to defend our interests and level the playing field, as prescribed in the March 2019 Communication.

BusinessEurope views were clearly articulated in their January 2020 paper "*The EU and China: Addressing the systemic challenges*", and during the *VIP webinar on EU-China relations*, organized on 8 May by the European Chamber of Commerce in China (EUCCC) and BusinessEurope, with the participation of Commissioner Hogan.

BusinessEurope advocates a strategic reorientation of the EU relationship with China, namely a more assertive and firm approach aimed at levelling the playing field and restoring the competitiveness of the EU industry.

MERCOSUR

On 28 June the European Union and Mercosur reached a political agreement for an ambitious, balanced and comprehensive trade agreement. It is part of a wider Association Agreement.

It is a strong signal from both regions in support of rules based international trade. It will create a unique bi-regional strategic political and economic partnership. The EU is the first to strike such a trade pact with Mercosur, and this will give European companies an important head start into a big market with great potential.

It will give EU firms important market access. For trade in goods Mercosur will eliminate duties for 91% of its imports from the EU. It also opens up access for EU firms to services sectors, closed until now. Mercosur will open its public procurement to EU firms.

It is also a good deal for our farmers. On the one hand, the agreement takes fully into account our agricultural sensitivities, notably in beef, sugar and poultry. Access on such sensitive products has been given only via carefully calibrated Tariff Rate Quotas. On the other hand, it gives us the possibility to export quality produce to Mercosur. The deal will protect from imitations a list of Geographical indications and will offer opportunities to increase its exports.

The organization welcomed the historic EU-Mercosur trade deal and congratulated EU negotiators on a breakthrough. After the political agreement was reached Business Europe President Pierre Gattaz said: "This agreement is the biggest the EU has ever concluded and will finally open a market of 266 million consumers that are keen to have access to European goods and services at competitive prices. We still need to know the details but we are confident the final outcome will be balanced and will safeguard the main European interests." Business Europe is generally supportive of the agreement given the big geo-political dimension and the positive impact expected for European industrial sector. Nevertheless the position within the organisation is nuanced as not all the members are equally enthusiastic.

It is important that European business speak in an unequivocal way in favour of the agreement, as the approval process is not going to be plain sailing. Business Europe has already spoken out in favour of the agreement and should be encouraged to continue to do so.

EU'S DIGITAL TRADE AGENDA

BusinessEurope is generally supportive of the EU's digital trade agenda, both in bilateral and the WTO e-commerce negotiations. However, they strongly criticise the EU's approach to cross-border data flows, which, in their view, lacks ambition. In April 2020, they sent a letter to Commissioner Hogan, explaining their views.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

WTO e-commerce negotiations

Digital trade (or 'e-commerce' as it is historically called in the WTO) has been a priority for the EU since the WTO started discussing it in 1998. Currently 86 WTO Members are engaged in the negotiations, which were launched in Davos in January 2019, including a high number of developing countries. The negotiations are chaired by Australia, Japan and Singapore and are open to other WTO Members to join. The Covid-19 crisis clearly increased the importance that WTO Members attach to these negotiations. The EU has been a strong supporter of these negotiations.

There is a wide range of issues (around 40) on the table i.a. in the areas of trade facilitation, cross-border data flows, consumer protection, the facilitation of electronic transactions, the protection of software source code and market access both in goods and services.

The aim of the co-conveners is to have a significantly more streamlined negotiating text by the end of 2020. This objective was also confirmed by the Ministers in the Ottawa Group early summer.

[REDACTED]

SCHREMS II JUDGEMENT

In the Schrems II judgment of 16 July 2020, the Court declared the EU-US Privacy Shield invalid (with immediate effect) while confirming the validity of Standard Contractual Clauses (SCC). Business Europe represents various companies that rely extensively on transfers of personal data to third countries and will therefore be interested in the follow-up of the Commission to the Schrems II judgment. On 21 September, a representative from Business Europe participated in an industry roundtable on the consequences of the judgment with Commissioner Reynders. During that meeting, Business Europe welcomed the constructive communication on both sides of the Atlantic and stressed that there is a lot of legal uncertainty, calling for urgent guidance from the European Data Protection Board.

What is the Schrems II case about?

The Schrems II case related to the validity of a specific type of instrument under the General Data Protection Regulation (GDPR) that enables the transfers of personal data outside the EU, namely Standard Contractual Clauses (SCCs) adopted by the Commission. The case concerned more specifically the use of the SCCs to transfer personal data to the U.S. and the safeguards that apply if such data is accessed by U.S. intelligence agencies. While the case therefore essentially concerned the protection afforded by the SCCs in general (in particular in relation to access to data by national security authorities third countries), as well as the use of SCCs to transfer personal data to the United States, there is also a link with the Privacy Shield. In particular, in its referral to the Court of Justice, the High Court asked questions about the protections provided to EU individuals by the U.S. legal framework in the area of national security, which is one of the aspects the Commission has assessed in its adequacy decision on the Privacy Shield.

In its judgment of 16 July, the Court declared the EU-US Privacy Shield invalid (with immediate effect) while confirming the validity of Standard Contractual Clauses but subjecting their use to stricter conditions.

What are the main findings of the Court in the Schrems II case?

On the Privacy Shield: the Court invalidated the Commission's decision, after concluding that several aspects of the US legal framework in the area of national security do not meet the standard of "essential equivalence" that is required for an adequacy finding. In particular, the Court finds that the limitations on the collection of data for national security purposes are not sufficiently clear and precise, and that EU individuals do not have access to effective remedies in the US.

On the Standard Contractual Causes (SCCs): while the Court confirmed the validity of the current SCCs, it also formulated strict requirements for their use. The judgment puts the responsibility on companies (in particular the data exporter in the EU), to assess the legal framework in a third country (including in the area of national security) before any transfer of personal data.

The judgment thus makes the use of such transfer mechanisms more complicated and might prevent companies from relying on them to transfer data to certain countries. At the same time, the judgment suggests that, in making that assessment, companies can take into account the specific circumstances of the transfer (e.g. nature, volume, purpose of the transfer) and have the possibility to supplement the SCCs with additional safeguards (e.g. in terms of data security). That may allow companies to continue carrying out some transfers on the basis of SCCs even to more "problematic" countries.

What are the Standard Contractual Clauses?

The Standard Contractual Clauses (SCCs) are model data protection clauses that an EU-based exporter of data and a data importer in a third country can decide to incorporate into their contractual arrangements (e.g. a service contract requiring the transfer of personal data) and that set out the requirements related to appropriate safeguards. These SCCs can be used as a tool for transfer of personal data to countries outside the EU that are not subject to a Commission adequacy decision. SCCs represent by far the most widely used data transfer mechanism for EU companies that rely on them to provide a wide range of services to their clients, suppliers, partners and employees. The SCCs are of general nature and are not country specific.

DG JUST is working on a modernized set of SCCs. The current SCCs have to be revised to bring them in line with the GDPR and will now be finalized to take into account the judgment of the Court. The adoption of new SCCs cannot take place immediately as it requires going through a number of procedural steps (opinion of the EDPB and greenlight of MS representatives in a comitology procedure).

What is the Privacy Shield?

The Privacy Shield took the form of an adequacy decision, i.e. a decision by which the Commission finds that a third country (or, as in this case, a specific framework like the Privacy Shield) guarantees a comparable level of protection of personal data than the one ensured in the EU. On the basis of such a finding, the decision enables data to flow freely between the EU and the concerned third country. By being part of the Privacy Shield, companies in the US could freely import personal data from the EU by subjecting themselves to a number of specific obligations (e.g. regarding sensitive data, security measures and limitations on further transfer to other third countries) that were enforceable under U.S. law. The Privacy Shield was adopted in 2016 following the 2015 ECJ ruling in the Schrems I case that invalidated the previous EU-U.S. arrangement, the "Safe Harbour" introduced in 2000.]

TRADE AND CLIMATE INITIATIVE

Main elements of an EU climate initiative

Trade in goods: the experience of the Environmental Goods Agreement (EGA) negotiations suggests a focused approach increases the chance of buy in and achieve a critical mass of participants. Following this logic, we would focus on tariffs reductions for a limited number of products with a clear rationale for climate mitigation, potentially complemented with products linked to circular economy (such as waste and plastic - of interest to developing countries). That said, we need to be open to requests for a broader scope, with the risk of difficulties of a very diverse list of products and difficulties in reaching agreement as we saw in EGA.

Trade in services: a similar logic applies to liberalisation of services where we should focus on services enabling climate mitigation and, potentially, circular economy. To increase the environmental legitimacy, it may be advisable to complement simple market access negotiations by an “understanding” on the commitments, which ensures that only those services, which serve an environmental purpose are liberalised.

Transparency: reinforce the role of the WTO and in particular, its Committee on Trade and Environment (CTE) by becoming a more efficient forum to monitor domestic environmental measures and foster best practices. We should also propose the introduction of new practices requiring countries to provide early information and engage in discussions on intended internal measures with relevance to trade. On the EU side, this would include for example CBAM. Finally, we are exploring whether we can take commitments on increasing transparency on fossil fuel subsidies in addition to the existing WTO subsidies notifications. This is highly politically sensitive within the EU and there are linkages to ongoing policy initiatives such as the European Green Deal, energy, taxation or the auspice of the EU Energy Union.

Development: developing countries are mainly interested in financial and technical assistance. As climate-friendly goods and services are exported mainly by the OECD countries, developing countries look at such initiatives with suspicion. To achieve a negotiated balance, we should have a development angle in our climate initiative, primarily through greening the WTO's Aid for Trade Work Programme. This process started earlier this year, when we successfully pushed for the inclusion of a strong environmental sustainability angle in the new biennial WTO Work Programme on Aid for Trade, adopted in March 2020. Other possible strands of work to get buy-in from developing countries will have to be identified, also involving DG DEVCO.

Process

We have started a reflection process with the Member states and the European Parliament (November) and we will reach out to other WTO members (end of November – focus on the FAST group, the Ottawa Group, interested countries in Africa, China, and the US). We will be also consulting stakeholders – through dedicated civil society meeting.

In the course of December/January, we will draw conclusions of our outreach and reflections to determine next steps – to give it visibility as an EU initiative, this could include an announcement early next year to the General Council of the WTO. Ideally, we would be able to pursue ideas jointly with other WTO Members to maximise the chances of a multilateral initiative.

TRADE POLICY REVIEW – BUSINESS EUROPE CONTRIBUTION

Below is a short selection of some of its key points:

On resilience:

- Need to maintain openness: Free, open and fair trade that is based on rules, are fundamental elements in building the EU's resilience and in developing a model of open strategic autonomy.
- Expansion of the WTO Pharmaceuticals Agreement to include more products and countries is welcome: instead of entering into a discussion on developing lists of products, it would be perhaps better to start with a list of principles or conditions that should be respected in the conduct of trade in the area of healthcare.
- Imports are also key to ensure EU's Open Strategic Autonomy: critical that the EU remains open.
- Reshoring cannot be the result of state intervention but rather the result of market-based decisions of companies and in full compliance with WTO rules.
- The EU cannot solidify and diversify supply chains alone. This requires the joint efforts of the EU and like-minded trading partners. EU's network of FTAs can play a big role.

On WTO and FTAs

- A prominent issue to address in this regard is the special and differential treatment of self-declared developing countries in the WTO: Criteria should be put in place, for instance to ensure that special and differential treatment is temporary and that flexibilities given to members that are not Least Developed Countries (LDCs) are limited and strictly needs-driven.
- Update existing WTO rulebook gets updated in order to better reflect the changing reality in global trade. For instance, the rules on industrial subsidies (including export credit), forced transfer of technology and on export restrictions. Plus importance of functioning DSM.
- Focus in implementation of FTA is a priority. Enhance regulatory cooperation.
- Simplifying RoO to reduce costs for businesses especially SMEs.
- Besides looking at more traditional instruments, such as trade facilitation, measures on transparency or cumulation of rules of origin, the concept of open FTAs is broader and more ambitious, as it covers all areas of trade. The EU could test this concept with partners such as the UK, Switzerland and Turkey.

On SMEs

- What the Commission should further make sure is that rules negotiated with partners in different FTAs are harmonised as much as possible.
- More can be done to inform SMEs about opportunities of internationalisation and encourage them to do business outside the EU

On the green transition

- At the multilateral level, our priorities include the revival of negotiations for an Environmental Goods Agreement. At the same time, reaching an agreement on emissions trading and carbon markets (finalising the rulebook on Article 6 of the Paris Agreement) is crucial.
- At the bilateral level and through its network of FTAs, the EU could in the future explore options to include targeted provisions on trade in environmental goods and services, including tariff reductions and addressing non-tariff barriers. Moreover, the EU should explore the possibility to extend the Trade and Sustainable Development Chapters in the EU Economic Partnership Agreements (EPAs).
- At the unilateral level, the EU can assess how environmental and climate standards can be taken into account in public procurement processes. Include Paris Agreement in GSP+.
- CBAM to be WTO compliant. should also be limited in scope and duration and cover climate related objectives only. Moreover, the EU should engage in a dialogue with our key trading partners in order to mitigate the risk of retaliation.
- Due diligence to be based on international standards and guidelines such as the OECD ones on Business and Human Rights.

On digital

- Having rules in the area of digital trade, including on e-commerce, is key to increasing legal certainty.
- Complete e-commerce nego. Conclude digital trade chapters in FTAs
- Digital protectionism is on the rise. The problem is that, without a clear legal framework, either at bilateral or plurilateral/multilateral level, there is a high risk of governments misusing the exception for the protection of personal data for reasons of national economic interest.

On LPF

- Need European strategic trade toolbox (WP, IPR, FDI screening...) and new rules on subsidies and SOEs needed.

On other issues to be addressed:

- Extraterritorial application of sanctions
- Politicisation of export controls.

CTEO, IMPLEMENTATION AND ENFORCEMENT APPROACH

BusinessEurope has been very supportive of the Commission's new focus on implementation and enforcement.

Its recent position paper on the Implementation of Free Trade Agreements released on 12 October 2020 contains 5 recommendations on increasing uptake and communicating on the opportunities offered by EU trade agreements. Four of these recommendations are centred on improving communication/information and knowledge on opportunities offered by FTAs to increase uptake by companies of "all sizes": i) simplify customs procedures and cut red tape to increase utilisation of tariff preferences; ii) provide more comprehensive and easily accessible information on main areas covered by FTAs (building on A2M); iii) collectively address lack of awareness of FTAs (EU, Member States, stakeholders, partner countries including through the development of binding national implementation action plans; v) enlarge annual reporting on FTAs to cover trade in services, public procurement, investment, and regulatory cooperation. The fifth recommendation is v) for the CTEO to develop a comprehensive enforcement strategy focused on a positive agenda.

These recommendations are well founded and acted upon by the Commission. The paper leaves open the precise role business associations would play in supporting the CTEO.

At the launch event for the "Access2Markets" portal (13 October), BusinessEurope was one of three business associations invited to deliver a short statement live. Among your interlocutors during the upcoming call, DDG Luisa Santos was then BusinessEurope's spokesperson addressing our A2M audience. She conveyed the following 5 points:

- Market Access: Trade will be key for the recovery, there are still a lot of opportunities in Asia (China, Indonesia, etc)
- Access to information: Manufacturing and services are increasingly intertwined, this requires more coordination and information sharing early on, at a more granular level
- Trade facilitation in customs procedures could spare some costs, thanks to digital tools. The Commission's initiatives need close coordination in that respect
- Safeguarding European interests: partners need to comply and respect their commitments; CTEO is expected to help with this
- How to address regimes of extraterritorial sanctions (by the US)

CV(s)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Contact(s):

On Industry relations and general coordination

[REDACTED]

On Open Strategic Autonomy

[REDACTED]

On relations with the United States

[REDACTED]

On relations with China

[REDACTED]

On Mercosur

[REDACTED]

On the EU's digital trade agenda

[REDACTED]

On Schrems II judgement

[REDACTED]

On Trade and Climate initiative

[REDACTED]

On CTEO, implementation and enforcement approach

[REDACTED]

[REDACTED]