

## The JBCE's Contribution to the EU-US Trade Dispute: FSC/ETI

**The current WTO trade dispute between the United States and the European Union over the US's exporting tax scheme policy will seriously affect Japanese businesses operating in the EU which import US products. The history of the dispute and the JBCE's position paper to the European Commission regarding the impact of possible US sanctions are discussed below.**

The US Foreign Sales Corporation (FSC) is an export promoting tax scheme which was adopted in 1984. The FSC allows American corporations established in a tax haven (such as the Virgin Islands, Barbados) to benefit from substantial corporate tax reductions.

In 1997, the EU filed a complaint with the WTO stating that the FSC scheme was an illegal export subsidy and requested that sanctions be placed against the US, i.e. impose 100% sanction on import duties up to US\$ 4,043 billion annually on U.S. origin products. As a result, the US replaced the FSC with the Extraterritorial Income Exclusion Act (ETI). Despite this action, the EU has claimed that the ETI was also illegal, which was subsequently accepted by the WTO in January 2002.

In June 2002, realizing the potential impact this trade dispute could have on Japanese businesses operating in the EU which import U.S. products, the JBCE submitted a position paper to DG Trade of the European Commission. Two months later, in August 2002, the WTO decided to allow the EU to impose sanctions. Upon this verdict, the EU started a public consultation in September 2002 in order to define the list of products which should be subject to sanctions, known as the ("hit list").

### "Sanctions should not jeopardize EU industry"

It was during the consultation process that the JBCE submitted a second position paper to the European Commission to highlight the following points:

- The JBCE expects and hopes that this dispute will be settled without an EU decision to launch sanctions against the US;

- In case the dispute cannot be settled, the JBCE believes that sanctions "should only be imposed in such a way as to not jeopardize the EU industry and the EU economy". More precisely, the JBCE requests that certain products and product parts be exempted from possible sanctions. These include parts and components imported into the EU for further processing, which would create employment and economic growth in the EU; and
- Other products should be exempted from the sanctions to ensure EU economic interest. These include products currently subject to zero % import duty in the EU because they are either covered by the Information Technology Agreement, Civil Aircraft Agreement or the duty suspension regulation.

Following the JBCE's Proposal, the European Commission in April 2003 adopted its "hit list", which was endorsed by the WTO in May 2003. It should be noted that **the list incorporated almost all of JBCE's requests.**

### "The JBCE calls for the EU and the US to resolve the dispute"

The European Commission, in line with the WTO's verdict, now has permission, although it is not obliged to, to retaliate against the US. However, it would be in the mutual interests of both the EU and the US to resolve the dispute and, therefore, avoid sanctions.

Currently, the US is trying to adopt new legislation that would comply with the WTO regulations. In response to US efforts, Trade Commissioner Pascal Lamy declared in a speech on 26 June 2003 that the EU will hold off on any retaliating measures until the end of this year. He commented further that if no satisfactory progress has been made by the US by September, the EU at that point would move forward with the necessary internal EU legislation to initiate retaliation.

Although the JBCE will most likely have its relevant products exempted from the sanctions, it strongly encourages the US to make all efforts to comply with the WTO rules to resolve a possible future trade dispute.

# The Pathway for Data Transfer From Europe

**In our newsletter No. 10 of Spring 2003, the JBCE commented on the observation paper it had submitted in response to the European Commission's present review of Directive 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data (referred to herein as "the Directive").**

## **1. The EU Directive**

This Directive addressed the potential growing risks of disputes and conflict which could arise when a single European entity controls individual data, such as data transfers from Europe to a third country. Currently, the Directive restricts cross-border data transfers to third countries, unless an "adequate" level of protection can be ensured under each national Data Protection law (Article 25).

## **2. Third Country bilaterals**

Hungary, Switzerland, Canada, Argentina and the U.S. (under the safe harbor agreement) are examples of third countries with bilateral agreements with the EU Commission which adequately satisfy this data transfer decision. If the 'adequacy' decision is not sufficiently set for a third country, data transfers can only take place if one of several conditions is met in Article 26.

## **3. "A Model Contract"**

This includes the establishment of a "Model Contract" between relevant companies as data exporter and importer, which should be authorized by the Member States Data Protection Authority. Any company in Europe engaged in the free movement of individual data between Europe and a third country would come under the jurisdiction of this contract.

## **4. The Japanese Data Protection Law**

With regards to the situation in Japan, the national Data Protection Law was adopted in May of this year. The JBCE hopes that the new law will "successfully and sufficiently satisfies the 'adequacy decision' for any Japanese entity transferring customers or employees' data from Europe to a third country." The JBCE also expects that in due course, the Japanese Data Protection Law will encourage greater substantial dialogue and discussion between the EU Commission and the Japanese Government.

## **5. Code of Conduct: an alternative approach**

As mentioned above, the JBCE in its position paper addressed the implications of data transfer legislation currently in place from Europe to a third country. In addition, the JBCE believes that a "Code of Conduct" approach, as described below, should also be seen as an alternative approach.

In a world of ever-increasing global cross-border data transfers, relying on standard "global rules" created by one entity or industry organization is attractive because it would help to avoid the possible obstacles as described previously.

## **6. WP29**

Moreover, the Consultation paper on binding Corporate Rules conducted by the Working Party 29 appeals to the interests of the JBCE members, providing a well-established place for such rules to create a more efficient and flexible "Code of Conduct". Nevertheless, the legal framework for binding corporate rules as described in the paper "is still unclear and ambiguous". These rules need to be made clear and coherent if the Code of Conduct approach is to become a useful and workable method.

To this end, the JBCE will be actively and continuously involved in the discussion with the EU Commission to create rational and sustainable corporate binding rules to pursue an alternative "code of conduct" for data transfer from Europe.

# The EU's Draft Reach Regulation — the JBCE Comments

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## I. Background

The JBCE submitted in July 2003 its position paper on the European Commission's draft REACH Regulation (Regulation on Registration, Evaluation, Authorisation, and Restrictions of Chemicals), which was open to consultation from 15 May to 10 July. The draft outlines a future system for regulating manufacturing and use of chemical substances, the so-called "REACH system".

The draft was released by the Commission following a two year period since first issuing its White Paper on the EU future chemicals policy, published on February, 2001. The White Paper had first proposed a rough sketch of the REACH system, having brought about a debate among relevant stakeholders including both the chemical manufacturers but also the downstream user industries and NGOs.

### The draft proposal highlights the following:

- Any manufacturer, importer, and downstream user of chemicals should implement a chemical safety assessment.
- Any manufacturer and importer that produces in /imports to the EU any chemical substance over one ton per year should submit registration for the substance to the European Chemical Agency which has the task of conducting a risk assessment in addition to providing other information.
- Any existing substance manufactured/imported over one ton per year should be registered within the deadline set in accordance with its production/import amount. If a manufacturer or importer does not register an existing substance within the deadline, the manufacturer should immediately stop production/importation of that substance.
- Downstream users should play an active role in the future system by providing usage information to manufacturers/importers and by implementing downstream user chemical safety assessments.
- To avoid unnecessary animal testing, available animal test data should be shared among registrants. Registrants who register later should obtain the necessary animal testing data from previous registrants (data holders), providing payments up to 50% of the costs of the testing incurred by the previous registrants.
- Manufacturers/importers/users of products with high toxic concentrated substances such as CMR (carcinogenic, mutagenic and toxic-to-reproduction), PBT (persistent, bio-accumulative, and toxic) and vPvB (very persistent and very bio-accumulative) should apply for authorization providing relevant data to justify their uses.
- A chemical substance included in articles should be registered if the total quantity produced is above one ton per year and if a sufficiently high amount is released in such a way as to adversely affect human health or the environment during normal use and should reasonably foresee conditions of use and disposal.

The JBCE had initially submitted a position paper in response to the REACH system outlined in the White paper in May 2002 from the perspective of a high-tech downstream user industry. At the time of the position paper, the JBCE had only downstream user companies as its members.

Currently, the situation has evolved as several chemicals manufacturers and importers have now joined the ranks of the JBCE. To reflect these changes and to represent the overall shared concerns/interests as Japanese industries operating in the in the EU, the JBCE has submitted a new position paper on the draft Regulation.

## II. The JBCE's Key Points

The JBCE shares the European Commission's goal of improving the EU's chemical regulatory policy and the health and safety of EU citizens and the environment. At the same time, the JBCE takes note that the future of the EU chemical regulatory framework should be based on an adequate sustainable balance between environmental and health objectives in addition to other society interests while being practical, workable, realistic and maintaining compliance with EU law and its international obligations.

### A. Scope

#### *Substances in Articles*

The registration requirements of the draft proposal "should apply to substances in articles only if they are intended to be released during normal use of the article". Subjecting all substances in articles to the

requirements of the REACH regime on the basis of broad and vague criteria on the potential release during normal use and disposal would impose an enormous administrative and testing burden on product manufacturers around the world. Manufacturers are only responsible for marketing products that are safe for the public, as laid down in horizontal legislation such as the General Product Safety Directive and other product specific Directives.

Moreover, the EU horizontal and industry specific waste legislation already requires that waste generated from manufacturing be adequately treated and disposed. Thus, imposing registration requirements for substances in articles should, therefore, be limited to those substances intended for release during normal use of the article. This type of approach would contribute to ensuring the workability of the system as well as avoid unnecessary trade disputes.

### *Substances in Preparations Regulated by Specific EU legislation*

The scope of the draft proposal should not include substances in preparations that are already regulated by specific EU legislation. As the draft proposal acknowledges, there is already EU sector-specific legislation in place, such as the Cosmetics Directive, for regulating the risks of substances and preparations. Sector-specific legislation, by taking into account the specific characteristics of the relevant industries, provides more effective regulation than horizontal legislation. Thus, where new regulatory measures are necessary for the protection of human health or the environment, they should be introduced by amending and extending the scope of vertical sector-specific legislation, not by integrating the specific sector in broad horizontal legislation, such as outlined by the draft proposal.

## **B. Duty of Care**

### *Requirements of Chemical Safety Assessment and Chemical Safety Report*

Requiring a Chemical Safety Assessment and a Chemical Safety Report for all levels is impractical. It would clear-

ly be too burdensome to require all actors in the supply chain to perform a Chemical Safety Assessment and to draft a Chemical Safety Report for every single chemical substance they manufacture, import or use, regardless of the substance's characteristics and quantity.

Thus, the requirement to perform a chemical safety assessment should be limited to substances that are subject to registration. In addition, the requirement to supply information through the supply chain should be limited to existing safety data sheets.

## **C. International Aspects**

### *Acceptance of Testing Data Obtained Outside the EU*

Testing data obtained outside the EU and on the basis of methods other than those laid down by the draft proposal should be widely accepted. The JBCE supports the Commission's proposition, as stated in Annex IX, to accept test data obtained by methods other than those described in Annex X. Data obtained outside the EU and on the basis of methods other than those of the draft proposal should be accepted in order to avoid unnecessary testing, including animal testing, and to avoid implementing unnecessary obstacles to trade.

### *Harmonization of Definition of PBT Substances*

The definition of PBT substances should follow existing international standards. The definition of PBT substances as listed in the draft proposal is not compatible with the internationally recognized definition included in Annex D of the Convention on Persistent Organic Pollutants. The draft proposal should incorporate the latter definition in order to avoid a possible misinterpretation of the REACH regime to avoid unnecessary restrictions to trade.

### *Non-discriminatory Treatment Against Foreign Downstream Users*

The draft proposal should not discriminate between

foreign and EU based downstream users. The draft proposal defines downstream users as persons "established within the Community other than the manufacturer or the importer," who currently may benefit from less stringent requirements if an actor in the supply chain has registered or obtained authorization for the chemicals they use.

Thus, importers of chemical downstream uses in the form of preparations (e.g. foods, cosmetics, personal care products) are not treated as downstream users but as importers of chemicals in preparations.

Manufacturers and importers of chemicals, unlike downstream users of chemicals, are subject to full registration and authorization requirements. Only downstream users outside the EU exporting their final products (soaps, detergent, etc) to the EU are recognized as importers and are subject to registration requirements about substances included in their products. Only manufacturers who supplied already registered substances to the non-EU downstream users will be exempted from registration requirements, although this occurs rarely. Such discrimination against foreign downstream users should not be unjustified especially when the European Chemicals Agency has already obtained data on the substances used.

#### **D. Data Sharing and Avoidance of Potential Supply Monopoly**

The registration and authorization procedures should not be the basis for de facto restrictive practices and monopolies against downstream users or later registrants and authorization applicants.

The JBCE welcomes the draft proposal's objective of avoiding the shifting of responsibility for chemical assessments to downstream users, who would be inadequately prepared for this exercise. There is a risk, however, that the proposed regime will create a de facto supply monopolies and restrictions for certain substances or preparations, or specific applications thereof (since not all current suppliers will be able to

support all substances and all uses of these substances).

To limit this risk, costs on testing should be shared on the basis of the quantities imported, produced or used. Similarly, first registrants and authorization holders should always be required to grant letters of access for data on the basis of reasonable costs sharing, and not on the basis of fixed fees that may result in a barrier to market access.

#### **E. Confidentiality**

The draft proposal should ensure the confidentiality of all sensitive business information. The REACH requirements on duty of care, registration, authorization, restrictions, classification, data sharing and public information should ensure that neither competitors nor the public may obtain sensitive business information, such as details on product formulations, identification of suppliers or customers, and production and marketing volumes. In particular, the link between registrants and authorization holders, substances, and specific uses should never be disclosed to the public or to third parties.

#### **F. Need for Clearer Definitions and Terms**

The draft proposal should ensure legal certainty by using clearly defined and unambiguous terms. Throughout its entire text, the draft proposal uses broad and ambiguous terminology which does not provide clear guidance to chemical manufacturers, importers and downstream users of their rights and obligations under the proposed regime.

### **III. Future Actions**

The JBCE will follow the issue closely and will study the draft proposal in more depth to assess key issues for Japanese industries and will request amendments, if necessary, during the decision-making process.

# JBCE Profile



The Kanji character on the left side means Europe. The colour of the logo was chosen from the national flag of Japan.

## JBCE Mission

The Japan Business Council in Europe was founded in 1999 as the representative organisation for Japanese companies operating in the European Union.

The JBCE's key objective is to contribute to EU public policy issues in a positive way, drawing upon the experience gained in Japan and other countries and utilising the expertise developed in specific fields, such as environmental protection and technological innovation.

The JBCE welcomes the support provided by EU Member States to Japanese investments, and wishes to put forward the views of its members on legislative issues currently under debate and on the public policies issues which will shape the years to come.

The JBCE wishes to become one of the business-based organisations contributing to the achievement of EU goals in areas such as competition, research and development, full employment and environmental protection.

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## JBCE Member Companies

Ajinomoto Europe S.A.S.	NEC Europe Ltd.
Alpine Electronics (Europe) GmbH	NGK Spark Plug Europe GmbH
Canon Europa N.V.	Nippei Toyama Europe GmbH
Casio Electronics Co. Ltd.	Nippon Express (Deutschland) GmbH
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