



Mr Herman Van Rompuy
President
European Council
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BELGIUM

12 November 2012

Dear President,

BUSINESSEUROPE is following discussions on the negotiating directives for a free-trade agreement between the European Union and Japan. To ensure that industry and services priorities are fully covered in a potential negotiation the level of ambition of the negotiating directives must be high for all market access issues.

In view of the upcoming European Council meeting, where this issue might also be addressed, we would like to highlight that any potential FTA would have to mirror at least the levels of ambition and comprehensiveness found in the EU-Korea agreement. The EU should take the time that is needed to finish the preparatory work and choose to start the negotiations at a time that best suits the EU's economic interests.

In a context where Japan already has low industrial tariff levels, the effective removal of non-tariff and regulatory issues must be given particular attention in the negotiating directives. Free trade with Japan will only be possible if the envisaged agreement is able to eliminate tariffs and non-tariff barriers alike. Clear roadmaps for the elimination of NTBs within reasonable timeframes should be implemented. Furthermore, the removal of NTBs should not be limited to those outlined in the scoping exercise but should include also the other significant barriers which impede the access of EU industries and services providers to the Japanese market.

A selection of very significant NTBs identified is described in detail in an annex to this letter and can be summarised as follows:

- Manufacturing (including processed foods): EU industries face numerous technical barriers to trade – notably related to the recognition of standards and conformity assessment and to opaque administrative and regulatory decisions.
- Procurement: Opaque bidding processes and undefined technical and legal criteria restrict access for European firms.
- Services: Numerous restrictions and regulatory privileges afforded to Japanese firms limit access for EU companies across a wide range of sectors. This also affects trade in goods.



- Investment: Legal barriers to foreign investment, notably through mergers and acquisitions rules, prevent EU access to the market for both investment and trade.
- Competition: Enforcement of competition rules can be weak which enables Japanese firms to block access to the market for EU companies. This notably restricts opportunities for private-sector procurement.
- Intellectual property: Restrictive handling of trademark and patent applications by the respective authorities.

By clarifying the roadmaps for removing these barriers in the negotiating directives, the EU will ensure that FTA negotiations can advance towards creating a level playing field between our two economies. Concerns remain in the European business community regarding the Japanese administration's commitment and ability to really open up the Japanese market by removing long-standing barriers to trade and investment.

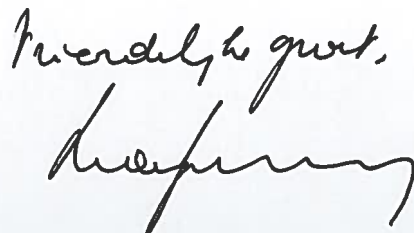
BUSINESSEUROPE would like to be consulted on the progress made with Japan on these important issues throughout the process to ensure that barriers are effectively removed in a way that enables companies to trade and invest in Japan. The progress of negotiations should be evaluated not only one year after its opening but regularly with close involvement of member states and business. If Japan does not show sufficient willingness to deliver, the negotiations should be suspended or cancelled.

Considering the need to reach a balanced FTA, that is to say, an agreement which includes a very ambitious chapter on non-trade barriers, the revision of the results of the on-going negotiations should take place every year and include a consultation process with the member states.

If this ambitious and comprehensive approach is pursued, more open trade and investment will provide genuine economic benefits to both the EU and Japan. I hope that you will take the issues into account in the negotiating directives.

This letter has also been sent to Mr José Manuel Barroso, President of the European Commission, and to Mr Karel De Gucht, Commissioner for Trade.

Yours sincerely,



Philippe de Buck



TRADE BARRIERS FACED BY THE EU INDUSTRY IN THE JAPANESE MARKET

Note: This document focuses on horizontal issues, but does not address any sector-specific barriers

Classification (e.g. SPS, TBT, tariffs, rules of origin, licensing, customs/trade facilitation, services, investment, IPR, public procurement etc.)	Description of the measure (details of the measure in place; proof of measure e.g. Legislation; any steps already undertaken by Japan to alleviate this concern)	Impact of the measure (please indicate if you can quantify the impact of the barrier on your industry)	Comparison with EU system	Possible solution (please describe possible solution that would be create a satisfactory situation for you)	Level of Priority (1 = low; 2 = medium ; 3 = high)
Overall objectives	<p>An FTA with Japan will be possible only when effective and comparable market access is demonstrated for European companies in Japan. Concrete initiatives to the removal of some of the major barriers would demonstrate that Japan is indeed willing to open its market to competition from Europe. There are also a number of issues that cannot be covered in a bilateral agreement, for example cooperation in defence technology or cooperation on raw materials. It is for that reason that BUSINESSEUROPE has put forward the creation of a new institutional structure like a high-level EU-Japan Economic Partnership Council (EUJ-EPC) to foster and deepen EU-Japan relations.</p> <p>It must be ensured that there is a factual openness of the Japanese market, and that this openness not only exists legally. All issues of significant economic interest to either party must be solved. Before embarking on free-trade negotiations, the Japanese government should demonstrate its willingness to liberalise these sectors of its economy. The scoping exercise should set some clear red lines of the level of ambition that will have to be achieved in a potential agreement. Any negotiations should be conducted in full transparency and close cooperation with the business community.</p>				

<p>Non-tariff measures (NTMs) / regulatory divergence</p>	<p>A mixture of divergent standards, including safety standards, testing procedures and certification processes, technical barriers to trade, SPS related barriers, lengthy and complex conformity assessment procedures, and others. Voluntary standards often are de-facto mandatory. The impact of attitudes, incl. the habitual buying behaviour, in the overall regulatory framework is another very important problem.</p>	<p>NTMs, regulatory divergence and different buying habits are the major obstacles to EU-Japan trade. The 2010 Copenhagen Economics study "Assessment of barriers to trade and investment between the EU and Japan" contains a large list of NTMs restricting market access.</p>		<p>Adoption of international product standards and cooperation / promotion of new international standards where needed. Mutually recognize products certified under similar and equivalent product standards. Drive regulatory convergence forward in highly regulated areas (e.g. transport, telecoms, health, financial regulation, industry). Aim at harmonizing regulations and systems where possible. Address issue of attitudes, incl. the habitual buying behaviour, by implementing targeted means (e.g. regulatory issue database projects / better communication).</p>	
<p>Tariffs</p>	<p>On average an applied rate of 4.9%, Japan has low tariff rates but some high peaks in e.g. dairy products, clothing, cereals, food and drink, leather, etc. This average is influenced by the annual temporary suspension of applied import duties that covers over 400 products. This duty suspension has to be renewed on a yearly basis by the Japanese Parliament.</p>	<p>Depending on the sector, these high tariffs effectively restrict access to the Japanese market. The yearly renewal of temporary import tariff suspensions creates huge business uncertainty.</p>	<p>The EU has also generally low tariffs, with some tariff peaks notably in the field of agriculture.</p>	<p>In case of non-reciprocal tariff liberalisation, market opening through tariff dismantling must be matched by respective NTB elimination. The business uncertainty derived from the yearly renewal of tariff import suspension should be addressed by permanently eliminating import duties for these covered EU products.</p>	
<p>Investment</p>	<p>Japan has a high degree of limits on foreign ownership, screening requirements and restrictions on</p>	<p>Japan has the lowest FDI stocks (as a percentage</p>	<p>The EU comprises the most open countries. Since</p>	<p>Include ambitious investment provisions in any agreement with Japan. Guarantee free market access, non-discrimination</p>	

	<p>foreign personnel and operational freedom. For example, Japanese regulations make investments / merger-acquisition very difficult. Major problems relate to the triangular merger scheme, prior approval requirements and M&A's in sensitive sectors. High labour costs and high taxes are also seen major obstacles to investment.</p>	<p>of GDP) of all OECD members. It is among the countries with the highest levels of overall restrictions. Therefore, the potential to increase FDI into Japan is enormous.</p>	<p>1992, intra-EU FDI flows are almost completely unrestricted. A number of EU countries have minimal overt restrictions on inflows from non-EU countries – although some restrictions also exist in some countries.</p>	<p>and national treatment, greater transparency and full pre- and post-investment protection, including free transfer of all investment-related capital flows. Strong rules on protection from unfair treatment or unfair expropriation, provide a mechanism for investor-to-state dispute settlement. Restrictions on FDI only on the basis of national security.</p>	
Procurement	<p>Although both GPA members, the Japanese legal framework remains difficult through its complex system of diverse statutes and regulations at central and local level and due to opacity, poor dissemination of procurement information and absence of a single point of access. In terms of coverage, despite the conclusion of a new GPA deal, there are still a number of entities (sub-central entities) that are not subject to GPA rules. On railways, we expect among others more concrete commitments on the draft road</p>	<p>Due to the complex system and discriminatory treatment, it is extremely difficult for European companies to win public tenders in Japan. Studies have shown that over 80% of Japan's total government procurement market is not covered by GPA.</p>	<p>The EU's combination of international commitments and Single Market rules has created a European market that is widely open to international competition. According to the European Commission, 95% of the EU contestable public procurement market is committed under</p>	<p>Secure reciprocal and effective market access with equal coverage of central, sub-central and other entities in the GPA, binding and simplified rules, and guaranteeing equal treatment of foreign and domestic suppliers. Jointly increase efforts to improve transparency (publication of all call for tenders under GPA conditions), endorse simplification of complex procedures for becoming registered as a "qualified supplier", push for mutual recognition of Japanese and European references and promote equal treatment and fair competition. Press for the suppression of exemptions and derogations of GPA rules, such as Japan's "operational safety clause" in railway procurement. The objective must</p>	

	map of negotiations regarding a more transparent, predictable and non-discriminatory application of the OSC.		the GPA (EUR 352 bn) ¹	be to reach an “effective and comparable market access”.	
Services	There are a number of restrictions (like commercial presence) on several services sectors (e.g. legal, construction, banking, telecommunications). Residency requirements are in place for most of the professional services; making export services basically impossible. Lots of difficulties and long delays in obtaining work permits.	All these obligations to foreign services providers have an impact, since small and even large European providers will consider it too expensive / complicated to do business with Japan. For those which would do so, these obligations have an obvious impact on the price of the service delivered.	Compared to Japan, the European market for services is much more open to foreign suppliers and market access, and largely bound under WTO commitments. However, European private sector would support any further opening in Europe.	All these issues would have to be tackled in potential negotiations. The starting must be the current offers in the WTO Doha round, but both sides should aim to go much further in removing any regulatory barriers (WTO plus) which make daily business activities very complex.	
Trade facilitation	General border procedures (e.g. customs valuation, classification and clearance) and product-specific customs procedures (e.g. health inspections) impose costs and delays on some exporters.			An agreement should be based, as a minimum, on the WCO Revised Kyoto Convention and WTO Doha results. Provisions should be focused on minimisation and/or elimination of fees and charges; procedures for legal recourse and appeal, complaint or mediation services in the case of disputes with customs; establishment of a single administrative window; and	

¹ Impact Assessment of the project of regulation on reciprocity on access to third countries public procurement markets
Trade barriers faced by the EU industry in the Japanese market

				accelerated and simplified procedures for release and customs clearance of goods. Following the agreement on the mutual recognition, both side should give more concrete benefits to AEOs (Authorized Economic Operators): e.g. once an economic operator is approved as an AEO in Japan, its status should be extended to its subsidiaries in the EU, and vice versa.
Intellectual property rights	<p>Japan allows importation of fake goods as long as they are for personal use. Accordingly, there is an inflow of counterfeit goods into the Japanese market.</p> <p>Cumbersome trade mark applications examination: The Japanese Trademark Office checks new trademark applications ex-officio to the existence of relative grounds for refusal in the form of similar earlier registered trademarks. The applied standards are so strict that even brands are considered as a hindrance, which could in fact co-exist even from the perspective of the affected owners.</p> <p>Patents: Restrictive patent prosecution and granting</p>	The described factors unfortunately lead to quite a large trade in counterfeit goods		<p>Japan needs to make all trade with fake goods illegal and better cooperate with overseas authorities to secure the closure of sites trading in fake goods. Japan should also improve and simplify the procedure for right-holders to receive information on suspected merchandise.</p> <p>The owner of the earlier mark would usually issue a letter of consent to overcome the official complaint. In Japan this is not accepted. What is considered as too similar by the Trademark Office cannot co-exist, even if the affected owners see no problem with such a co-existence. In most countries this procedure was already abolished. Instead, it should be the responsibility of the owner of an earlier trade mark to defend it, if he feels disturbed by similar younger brands.</p>



		<p>practices</p> <p>JPO could consider supplementary experimental evidence to support generic patent claims. Currently, the JPO in many types of applications will only grant protection for embodiments disclosed in the application as filed. In addition, paediatric extension of pharmaceuticals is not available in Japan.</p> <p>Inventive step practice: JPO should not “frivolously” combine many prior art documents without a proper motivation for the skilled person to do so. In other words JPO should follow more strictly the three “Imura” cases (2008-10096, 2008-10153 and 2008-10261).</p>			<p>It is a problem that could be solved by amendments to the Guidelines – especially those for chemical and biotech inventions.</p> <p>JPO should directly include the “Imura” decisions in the Examination guidelines to encourage the examiners to follow their own case law.</p> <p>Enhanced cooperation among Patent Offices is key in order to avoid unnecessary duplication of work. The Patent Cooperation Treaty is the most appropriate platform for work-sharing.</p>	
Competition policy		<p>As discussed under investment, Japanese regulations make investments / merger-acquisition very difficult. Major problems relate to the triangular merger scheme, prior approval requirements and M&A’s in sensitive sectors. Moreover, within each sector there are a handful of conglomerates which</p>			<p>Japan should, where appropriate, install meaningful systems to enforce competition policy. Disciplines should include basic principles of transparency, non-discrimination, government subsidies as well as commitments to tackle hard core international cartels.</p>	

	control most of the market, and which European companies are therefore dependent on.				
Transparency / better regulation			The EU strongly encourages adherence to a certain number of procedural safeguards designed to ensure transparency, objectivity and administrative efficiency in decision-making. These provide companies with predictability and ensure that decisions are neither arbitrary nor abusive.	Support to similar principles of transparency, objectivity, better regulation and administrative efficiency, including deadlines for decisions and objective justification for these decisions. Pro-actively increase mutual understanding of existing and upcoming regulations on each side to exclude unwittingly taking initiatives that create barriers to trade. Exchange annual legislative work programmes at the earliest stage to prevent regulatory divergence and agree to an early warning system for draft legislation.	
Dispute settlement	The WTO system should remain the main avenue for solving disputes. However, a mechanism should be established to deal with complaints in case of violations of the bilateral agreement.			A binding and effective bilateral dispute settlement mechanism with clear cut deadlines. This should be set up in analogy to the WTO mechanism or the mechanism enshrined in the FTA between the EU and Korea. Companies should have direct access.	