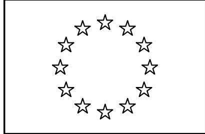

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REPORT FROM THE COMMISSION TO THE EUROPEAN COUNCIL

Trade and Investment barriers Report 2012

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Trade and Investment Barriers Report 2012

1. INTRODUCTION

In 2011, the Commission presented its first Trade and Investment Barriers Report (TIBR) to the European Council. The report was issued in follow up to an undertaking in the Europe 2020 Strategy[1] which was subsequently taken up in the Commission's Communication *"Trade, Growth and World Affairs"*[2]. The aim of the report was to *"focus attention [at the political level] on the common efforts needed on a selected set of market access barriers"* which prevent European companies from exporting to or investing in third countries. The report aimed at raising awareness of the importance of addressing such barriers in a focused and concerted way so that European companies can reap the benefits of the global market in accordance with what has been negotiated with the EU's trading partners at the multilateral or bilateral level.

This document is the second Trade and Investment Barriers Report. It provides an account of the progress achieved on the 21 barriers identified in the first edition and also identifies a number of new barriers which merit concerted action and political prioritisation both by the Commission and Member States. As in the 2011 edition, this report focuses on market barriers in some of the EU's strategic partners, i.e. China, India, Japan, Mercosur[3], Russia and the US[4].

The focus on some of the EU's strategic partners does not mean, however, that barriers in other markets will not be addressed. On the contrary, the Commission is actively engaging with a broader group of trading partners including countries such as Vietnam, Indonesia, Ukraine or Turkey - where European companies are faced with a considerable number of barriers - in order to improve market access conditions.

Removal of specific trade barriers remains a corner-stone of the EU's relationships with third countries and an important component of EU trade policy. This becomes even more relevant in the present context of protracted economic crisis, which has a severe impact on many

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[1] *Europe 2020, A European strategy for smart, sustainable and inclusive growth.* http://europa.eu/press_room/pdf/complet_en_barroso___007_-_europe_2020_-_en_version.pdf

[2] *Trade, Growth and World Affairs*, COM (2010) 612, 9.11.2010. http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf

[3] Argentina and Brazil.

[4] On Strategic Partners in general see: European Council Conclusions of 16 September 2010 point 4.: "*The European Union's strategic partnerships with key players in the world provide a useful instrument for pursuing European objectives and interests. This will only work if these partnerships are two-way streets based on mutual interests and benefits and on the recognition that all actors have rights as well as duties*."

European companies and citizens in the EU. In this context, trade is a fundamental driver for stimulating economic growth and creating jobs[5]. At the same time however, increasing risks of protectionism[6] pose a threat to an open trading system. It is, therefore, in the EU's genuine interest to promote and pursue trade openness in all fora - both multilateral and bilateral.

With the prospects of concluding the Doha Development Agenda in the near future waning, the EU has refocused its trade strategy on bilateral negotiations. A very comprehensive and ambitious Free Trade Agreement with South Korea provisionally entered into force on 1 July 2011 and will provide significant economic benefits to European companies and consumers. Bilateral trade negotiations were concluded with Central America, along with Peru and Colombia. Negotiations are being concluded with Ukraine, are well under way with Canada, India and Singapore and are ongoing with Malaysia and Mercosur. New FTA negotiations have been launched with Georgia and Moldova and discussions are being held with Indonesia, Vietnam, Thailand, the Philippines and Japan in view of possible negotiations. Russia's accession to the WTO opens new perspectives for the ongoing negotiation of a New Agreement. With regard to the US and China, the EU is engaged in high-level dialogues dealing, inter alia, with market access barriers. Furthermore with regard to China, the EU is currently assessing the desirability and feasibility of a standalone investment agreement.

With such a comprehensive negotiating agenda, it is essential to make existing market access commitments for European companies in third countries irreversible, as well as even generate new market access. This also helps create stable and predictable framework conditions for business activities worldwide. The successful conclusion of negotiations, however, is only one side of the coin. The other side – equally important - is making sure that opportunities created through negotiations are indeed translated into real trade flows on the ground. All too often, in practice, European companies are still facing considerable barriers in entering foreign markets. These barriers are often in the form of non-tariff barriers, such as technical regulations and standards, burdensome customs procedures or weak enforcement of intellectual property rights. Increasingly, since the start of the economic crisis in 2008, barriers proliferate in areas where international trade disciplines are still rather weak – such as in government procurement and export restrictions.

Trade negotiations and enforcement must go hand in hand. Strengthening the negotiating agenda inevitably triggers a stronger focus on enforcement. This is also underlined in a recent Resolution by the European Parliament[7] which provides valuable orientation for the work of the Commission and Member States on trade barriers. It reflects the rising political awareness that tackling trade barriers is crucial for both the legitimacy and effectiveness of trade policy. As a result, enforcement must be pursued as a matter of priority, especially in times of economic crisis, including at the political level.

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[5] Commission Staff Working Document *"Trade as Driver of Prosperity"* accompanying the Commission's Communication on *"Trade, Growth and World Affairs"*.

[6] World Trade Organisation, *Overview of developments in the international trading system*, 21 November 2011; World Trade Organisation, Report on G20 Trade Measures (May to mid-October 2011), 25 October 2011; DG Trade, *Eighth Report on Trade Restrictive Measures – October 2011-September 2011*, October 2011 http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148288.pdf

[7] Report on trade and investment barriers (2011/2115 (INI)), Committee on International Trade o the European Parliament, Rapporteur: Robert Sturdy.

The key message of this report is consistent with the core idea behind the Market Access Strategy: Where Commission and Member States put their weight behind focused and determined action in a coordinated manner, barriers in third countries can be removed and European companies can get better access to foreign markets. Success does not always come about quickly and is not always as far-reaching as economic operators would wish. But when it does occur it can provide considerable economic benefits to European companies and citizens.

This second edition of the TIBR is structured as follows: Section 2 sets out the progress achieved with regard to the barriers identified in the last report and identifies options for further action where progress is not yet satisfactory. Section 3 proposes a number of new barriers for priority action in the future. Section 4 outlines an emerging tendency towards the introduction of trade-restrictive industrialisation polices in some countries.

2. 2011 BARRIERS: WHAT PROGRESS WAS ACHIEVED?

The TIBR 2011 identified 21 barriers in six trade partners/regions. These barriers were considered to be of major importance for European business given the potential economic or systemic impact and the strategic importance of the countries where those barriers had emerged. These market access issues have been elevated to key priorities in the EU's bilateral trade relations with the countries concerned. The Commission has sought to systematically raise them in all bilateral meetings including up to the highest political level where appropriate (e.g. summits).

This section will report on the most important actions carried out on the barriers, along with the progress achieved in the course of 2011. A comprehensive summary of all actions taken by the Commission, including at working level, is available in the attached staff working paper. In some cases, progress has translated into the full removal of a barrier. In other cases, while some improvement has been achieved, part of the barrier remains. For a few barriers, the situation has deteriorated as compared to last year notwithstanding the numerous actions undertaken.

Analysis in this section will be carried out along these three categories according to the degree of progress achieved. For Russia, the upcoming WTO accession has the potential of solving many longstanding market access issues; the state of play of barriers in Russia will therefore be analysed under a separate category.

2.1 Barriers where substantial progress was achieved

Substantial progress was achieved on two **measures concerning India**. First, success was achieved in **removing restrictions on the export of cotton**, namely on cotton yarn and raw cotton, which were introduced in 2010. In August 2011, the Indian government ultimately lifted any remaining quantitative restrictions on raw cotton. At present, no restrictions on the export of cotton are applicable. Export restrictions on cotton and products thereof were of great concern due to their upward pressure on world prices and the distortions they were causing on security of supply. Moreover, India has remained one of the main EU import

sources for cotton products: in 2009, 23% of import for the products concerned by the restrictions came from India. Therefore, lifting of this barrier is of high economic importance for EU companies, particularly those in the textiles sector. In the course of 2011, EU concerns were raised with the Indian authorities on many occasions, including by the Director General of DG TRADE.

The second Indian measure where substantial progress was achieved concerned the **licensing requirements** introduced in 2010 for **telecommunication equipment**; these were ultimately modified so as to eliminate most of the burdensome conditions. According to the initial requirements introduced in 2009 and 2010 based on concerns relating to security, foreign telecom equipment providers should have transferred their technology within the first three years of contract and replaced their engineers with Indian ones within two years. Moreover, certain sensitive information would have to be disclosed to the Indian authorities for security reasons. Such requirements, however, departed considerably from consolidated international practices. As a result of concerns expressed by various actors and countries, including the EU, India finally discontinued the strict security rules, including requirements to mandatorily transfer technology.

The actions undertaken by the Commission during 2011 proved very effective: The issue was raised on all occasions including by President Barroso at the EU/India summit in December 2010. The progress achieved has contributed to solving the most relevant issues for the EU industry. India's total telecom equipment market had a value of around 16.7 billion € in the financial year 2010-11. The Commission remains in close contact with the industry concerned and will follow up on some technical issues which are still open.

2.2 Barriers where some progress was achieved

Progress was also achieved on a number of other barriers identified in the TIBR 2011. Nevertheless, these issues are not yet completely solved and therefore will remain on the list of priories for 2012. In some cases, barriers are of a systemic nature and are longstanding issues in bilateral trade relations. Therefore, the improvements achieved in 2011 are promising signals for what could be further achieved this year. The Commission will continue raising these issues in all fora, building on the good progress achieved in 2011, aiming at reaching a full removal in 2012.

As regards **China**, the Commission's persistent action has paid off for one of the most systemic issues on the list of bilateral trade irritants. Important progress was achieved on the so-called **'indigenous innovation' policy** which is based on the principle of providing access to public procurement only for innovative products whose intellectual property is of Chinese origin. After initial positive indications already given at the meeting of the High Level Economic and Trade Dialogue in December 2010, China made concrete steps in 2011 towards de-linking procurement from requirements on the origin of intellectual property, e.g., by removing any reference to indigenous innovation from the draft implementing decree of the Government Procurement Law and by committing to suppressing mandatory catalogues (including provincial catalogues). Moreover, the Ministry of Finance (MOF) adopted a notice announcing the abolishment of three national indigenous innovation-related policies. Finally, at the US-China Joint Commission on Commerce and Trade meeting in November 2011, China made further concrete moves on the issue of ensuring implementation of commitments at provincial level.

The Commission acknowledges and welcomes the important progress achieved in 2011 as an important step towards eliminating discriminatory provisions in an important area as public procurement. The Commission will continue monitoring the follow-up commitments made by the Chinese side, so as to ensure that these translate into actual access to Chinese markets for European companies.

In the meantime, positive developments can be reported on the EU's action to address Chinese **export restrictions on raw materials**, in the framework of the dispute launched at the WTO in 2009 regarding nine products[8]. The WTO Panel issued its report in July 2011 which clarified that export restrictions, as applied by China on a number of raw materials, are inconsistent with China's obligations under WTO law. The Panel found, in particular, that China's export duties on the raw materials at stake were inconsistent with China's obligations under its WTO Accession Protocol. The exports quotas imposed by China on this set of raw materials were found to be violating the general prohibition to introduce quantitative export restrictions. Moreover, the Panel found that the measures in question were not justifiable on the ground of concerns on protection of the environment or on shortage of an essential product. China appealed the Panel's report and, on 30 January 2012, the WTO Appellate Body confirmed the illegality of the Chinese quotas and export duties. In the course of 2011, the Commission also continued raising the broader issue of export restrictions on raw materials beyond the specific WTO case, since this Chinese policy continues to cover a very wide range of fundamental raw material components, such as rare earths. Following the publication of the Appellate Body's report, the Commission will consider how to address this matter further.

Also with **India**, while FTA negotiations are ongoing, some progress was achieved in sanitary and phytosanitary (SPS) issues, more specifically as regards bovine genetic material, in respect of prospects of alignment to international standards. However, further progress is needed in order to fully unblock exports from the EU. Furthermore, in the food safety area, India provided ad-hoc guidelines in October 2011, which will facilitate trade for several EU's agri-food products exported to India. Overall, however, India still needs to further align with international standards to fully open its market to EU products. Therefore, the Commission will continue raising these issues in all multilateral and bilateral fora with the Indian authorities building on the positive achievements of 2011.

In **Japan**, while preliminary discussions are progressing with the prospect of possibly launching FTA negotiations in 2012, some progress was achieved on **medical devices** as a follow-up of commitments taken by Japan at the 2009 EU-Japan Summit. Following regular contacts with the Ministry of Health, Labour and Welfare, "pre-market" approval procedures applied in Japan for medical devices were clarified and a small improvement in the conformity assessment process was achieved for certain categories of medical devices (e.g. limitation of "on site " audits to Class IV medical devices every two years only). The Commission will be monitoring the implementation of this commitment and will continue pursuing further improvement and simplification of the Japanese conformity assessment

[8] On 23 June 2009, the EU and the US, followed by Mexico, requested WTO consultations with China regarding Chinese export restrictions on nine products: bauxite, coke, fluorspar, silicon carbide, silicon metal, zinc, magnesium, manganese, yellow phosphorus. In particular, the EU asked for consultations on China's export duties and quotas and its measures for quota administrations and licensing as well as on China's system of a minimum export price. A Panel was established in December 2009.

procedures for ensuring they do not constitute an unjustified obstacle to market access for medical devices, as well as for other products.

Progress was also achieved with Japan on the front of **government procurement**, in the framework of the Government Procurement Agreement (GPA) negotiations that were successfully concluded in December 2011. Japan in fact undertook the commitment *vis-a-vis* the EU to apply the operational safety clause in railways procurement in a transparent and non discriminatory manner. This commitment should result in a non-discretionary use of the clause, thereby keeping procurement in the railway sector open to foreign operators.

Progress was also achieved as regards the **"100% scanning"** legislation of the **US**. As a result of a number of actions, including by the European Commission, the US Secretary of the Department of Homeland Security announced that she would seek the postponement of the entry into force of this measure, which was initially foreseen for 1 July 2012. This is a first step hopefully leading to the repeal of this legislation by the US Congress. This followed actions taken in the framework of the Transatlantic Economic Council (TEC), notably in 2010 and 2011, where the issue of secure trade was addressed. Cooperation on supply chain security between the EU and the US was spurred by a joint statement by US Homeland Security Secretary Napolitano and Commissioners Šemeta, Kallas and Malmström on 23 June 2011. This statement provides a political framework for EU-US cooperation, both bilaterally and in multilateral organisations such as the WCO, International Civil Aviation Organisation (ICAO), International Maritime Organisation (IMO), and the Universal Postal Union (UPU). At the November 2011 TEC meeting, the EU and the US followed up on the statement by completing their preparatory work on mutual recognition of trade partnership programmes, which, once signed and implemented in 2012, will form part of an alternative to the 100% scanning procedure.

There was also some – albeit limited – success with regard to the **"Buy American"** legislation. The stimulus package introduced during the financial crisis in 2009[9] which contained far-reaching "Buy American" provisions expired in September 2011 and was not extended. Nevertheless, the tendency in the US Congress and Administration of tabling legislative proposals with similar "Buy American" provisions is still present in the currently critical economic context. The most recent example is President Obama's announcement in September 2011 of the so called "American Jobs Act" proposal, which would introduce a public spending programme in infrastructure, subject to "Buy American" requirements. Prospects for the adoption of these initiatives remain rather uncertain at the moment given the current political context in the US Congress. The Commission, however, will remain vigilant on all possible developments towards the adoption of "Buy American" provisions in new legislation.

2.3 Russia – The implications of the WTO accession on longstanding market access issues

[9] On 13 February 2099, The Congress passed a 790 billion $ American Economic Recovery and Reinvestment Act (ARRA) including two Buy America(n) provisions, which prohibit funds appropriated by ARRA: (i) to be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel and manufactured goods used in the project are produced in the United States (ii) and/or to be used for the procurement by the Department of Homeland Security of a detailed list of textiles items (e.g. clothing, tents, cotton and natural fibres, etc) unless the item is grown, processed in the United States.

Russia has concluded the 18 year process towards WTO accession and will formally accede to the WTO in the course of 2012. Russia will, therefore, have to implement multilateral disciplines which should help solve several longstanding bilateral market access issues, while helping prevent the introduction of any new measures running counter to its WTO commitments before formally becoming a WTO member.

First, accession to the WTO will also settle the Russian **trade-related investment measures in the sector of motor vehicles and their components**. According to the agreed terms of accession, the Russian investment programme will be exempt from WTO rules until 1 July 2018, by when Russia will be phasing out these measures. At the same time however, a bilateral agreement between EU and Russia establishes a compensation mechanism which would be triggered if EU exports in parts and components of motor vehicles decrease as a result of the application of the Russian measures.

Progress is also expected in the area of **customs practices**. Concerns that arose in the context of the customs union formation have partially been solved thanks to close contacts between the Commission and Russian authorities and to a transitional period in the implementation of the new Customs Code. New customs practices have, by and large, not translated into further barriers to market access as originally feared. Nevertheless, issues such as arbitrary interpretation of customs legislation by Russian authorities continue to remain a cause of concern. Russia's accession to the WTO is expected to bring a number of improvements, as Russia becomes subject to WTO provisions and to such agreements as the WTO Agreement on Customs Valuation, all of which will contribute to trade facilitation. Work has also started with a view towards implementing the objectives of the EU-Russia Strategic Framework for Customs Cooperation, aiming to achieve maximum trade facilitation while ensuring security and safety.

Progress is also expected on intellectual property right matters (**IPR**) where the bilateral EU-Russia Intellectual Property Dialogue should continue to prove very useful in dealing with enforcement-related problems.

Finally, progress on the many **SPS issues** should be expected since Russia needs to ensure full compliance with international standards and apply them in a non-discriminatory manner. Russia should further ensure that its SPS measures are based on the principles of transparency and scientific justification, and that they are proportionate and non-discriminatory. Pre-accession discussions on SPS matters at the WTO have already led Russia to make a number of commitments and adopt several texts - including at the level of the customs union with Belarus and Kazakhstan - in order to prepare the full alignment of SPS norms with international standards by the date of accession. Other decisions or norms have been adopted or are in preparation[10]. The implementation of these acts and other legislation in conformity with WTO/SPS rules needs to be closely monitored in order to ensure that Russia is in full compliance with its SPS obligations as soon as it joins the WTO, in particular as regards non-discrimination and proportionality. In parallel, the Commission continues bilateral discussions with Russia, as well as its customs union partners, regarding necessary further adaptation of Russian and customs union disciplines to international norms.

[10] These norms would provide guarantees on transparency, proportionality, non-discrimination, equivalence, risk assessment, veterinary control and certification, import and transit permits among others.

With Russia's WTO accession, a very important step has been taken towards solving many of the longstanding trade barriers encountered by European companies in the Russian market. Monitoring Russia's implementation of its WTO commitments against progress on these barriers will be high on the EU's enforcement agenda in 2012 and beyond.

2.4 Barriers where no progress was achieved in 2011

In spite of action undertaken by the European Commission during 2011, including taking issues to the highest political level in some cases, no significant progress was achieved on some barriers. These will remain on the list of priorities for 2012.

For instance, **China** has not offered progress on two of the barriers identified in the TIBR 2011. Investment continues to be a crucial area in bilateral relations with China, given the vast potential offered by this country. Nevertheless, investment barriers persist and the picture has not improved in 2011. Adding to the existing foreign-direct investment (FDI) screening mechanisms, in February 2011 China adopted a National Security Review Mechanism which allows for the vetting of mergers and acquisitions involving foreign investors against national security considerations (see section 3). Its overly broad and ambiguous scope has raised concerns over new potential future barriers for foreign investors in China. This signal was confirmed by the long-awaited draft revision of the **Investment Catalogue** issued by the National Development and Reform Commission in April 2011, which did not meet expectations regarding further opening of China foreign investment, for instance in the area of telecommunication, financial services[11], construction, retail, express delivery or some manufacturing sectors such as cars, notably in the electrical vehicles subsector. Commissioner De Gucht raised this issue on the occasion of the Joint Committee of July 2011 and the Commission provided detailed comments to the Chinese authorities at the technical level. The Catalogue was adopted on 24 December 2011 with no substantial changes from the April draft.

The Commission continues to actively work on overall investment relations with China. Following the launch in 2010 of a bilateral EU-China taskforce on investment, discussions are ongoing to work towards the potential launch of negotiations of an EU-China investment agreement that should include market access aspects as well as the highest standards of protection for investment and would include further transparency mechanisms to increase legal certainty for EU investors in China.

In the area of standardisation and technical regulation, Chinese barriers in the **ICT security** sector that were identified as a priority (e.g. OSCCA[12] regulation on commercial encryption and the Multi-Level Protection System - MLPS) continue to cause concern. The Commission has undertaken many efforts in 2011 by raising this issue at Ministerial level. On all occasions - and more specifically with regard to the revision of the **OSCCA regulation** - the Chinese authorities have signalled that the revised regulation will be published for stakeholders' consultation ahead of adoption, will address industry concerns and will be more open to foreign technology. Nevertheless, the timeline of the new regulation's adoption, which was expected for 2011, remains unclear. In the meantime, the OSCCA regulation and the MLPS continue being used as legal basis for the adoption of measures related to information

[11] Insurance for instance still belongs to the 'restricted' category of investment.
[12] Office of State Cryptography Administration.

security, such as in the case of 6 standards for IT appliances. In 2012, the European Commission will continue raising this issue on all occasions and will pursue its efforts to try and reach all relevant Chinese authorities involved in this very complex web of measures.

No substantial progress was achieved in **India** on opening up certain sectors to **foreign investment**, such as legal services, accountancy, insurance, banking and financial services. Equally, concerns persist over the reform of the postal sector and potential negative impacts on express delivery services. These issues are being dealt with mainly in the context of current FTA negotiations. Proposed legislation currently under discussion for adoption would allow foreign investment in retail and distribution services. Investment in multi-brand retail, on the other hand, was swiftly put on hold sine die due to a negative political and social reaction. In **Japan**, limited progress was achieved on some of the TIBR 2011 barriers despite the intensification of bilateral activities in the course of 2011. Following the last EU-Japan Summit in May 2011, a scoping exercise was launched with a view to exploring the scope and level of ambition of future FTA negotiations. This exercise provides a useful forum for raising specific barriers with the Japanese authorities. While some progress was achieved on conformity assessment procedures for medical devices and government procurement (see section 2.2.), the state of play has remained unchanged on **financial services**.

Finally, no improvements were obtained on the barriers identified in 2011 for the **Mercosur** countries, where, on the contrary, the continuation of some protectionist tendencies was observed, notably with regard to the measures in place in Argentina and Brazil[13]. For some of these barriers (e.g. **restrictions in maritime transport and export restrictions on raw materials in Argentina and Brazil**), the FTA negotiation is the main framework where issues are currently being discussed; therefore such issues will be prioritised in that context. The Commission has, in addition, raised these irritants with Argentina and Brazil bilaterally and will continue to do so in 2012.

In the case of **Argentina's non-automatic import licenses (NALs)**, the system has remained in place and the situation has not improved. In fact, in March 2011, Argentina extended the application of non-automatic import licences to a list of 178 new tariff lines[14]. As a result, the non-automatic licensing system now covers 589 tariff lines, thereby affecting 12.3% of EU exports to Argentina. While the exports from the EU has been hit by these measures relatively less than exports from other countries like the US, China or Brazil, the loss for European companies estimated from the application of this licensing regime amounts to USD 147 million from January to September 2011. The Commission has raised this issue with Argentina on various occasions both bilaterally and together with a large number of other countries in relevant WTO bodies.

Following interventions by the Commission, the Argentine government has shown some limited readiness to find solutions on a case-by case basis. This has somewhat contributed to alleviating the most acute cases for European companies. The problem, however, remains very serious in particular because Argentina has forced companies into import/export compensation plans, whereby, for every peso imported, companies have to export the same monetary amount thus seriously distorting business decisions. Given the seriousness of the

[13] DG Trade, *Eighth Report on Trade Restrictive Measures – October 2011-September 2011*, October 2011 http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148288.pdf

[14] The extended scope now also includes some cars and parts thereof, motorcycles, bicycles and parts thereof, textiles, metallurgical products and some electric products.

situation, the Commission is examining all possible options, including launching a WTO dispute settlement case. This also includes consultations with other countries affected by this.

The situation also worsened as regards access to government procurement in **Brazil**. In 2010, Brazil introduced a horizontal **25% preference margin** in its national public procurement law which was immediately applied to the ICT sector. The issue was raised on several occasions, such as the Joint Committee, in the course of 2011. Nevertheless, in the meantime, the Brazilian government announced that the preference margins will be applied to health, communication and high-tech equipment as well.

All barriers mentioned in this section deserve particular attention for enforcement action in 2012. The Commission will vigorously work on these barriers and further step up action at all levels, including – where appropriate - at bilateral summits, through FTA negotiations or dispute settlement procedures so as to ensure tangible progress can be registered by the time of the next report in 2013.

3. NEW SIGNIFICANT BARRIERS IN OUR TRADE RELATIONS

In addition to the barriers identified in the TIBR 2011 as unsolved, a number of new market access barriers emerging in 2011 merit being included in the list of priorities for enforcement action for 2012.

China undertook important developments concerning investment, also in conjunction with the adoption of the 12th Five Year Plan which outlined priorities for industrial development to be achieved in the following five years. In this context, China adopted a **national security review mechanism for mergers and acquisitions involving foreign investors** in February 2011, whereby China could block foreign acquisitions on the ground of national security considerations. Judging from the text of the measure and the provisional indicative list of sectors that could potentially be included in the scope of this mechanism, it appears that the notion of national security is very broad and could extend to economic policy considerations. The sectors considered important for national security include some going beyond "classic" notions of security related sectors such as defence or energy by including, for instance, medical devices mail, delivery, warehousing, and retail and wholesale services.

Another issue of concern are Chinese **export financing conditions and subsidies**. China uses export credits not in conformity with the OECD/WTO disciplines to boost its national champions' exports in capital-intensive, often high-tech sectors. This increasingly poses serious challenges for very large, global and competitive EU companies and threatens sectors that are significant for the EU's economy, not only in third markets, but also in Europe itself. In addition, many industries are subsidised in a non-transparent way, including through the activities of state-owned enterprises (SOEs) and banks, as well as through the provision of subsidised land, materials and energy. This issue is not new. Nevertheless, action to tackle these anti-competitive practices must be intensified and these issues need to be systematically raised at the highest level given the implications these practices have in terms of hindering market access in many sectors, as well as of distorting competition on international markets.

India is in the process of introducing a new **National Manufacturing Policy (NMP)**, which was approved in October 2011 by the Union Cabinet of Ministers. The NMP still has to be approved by the Parliament. The plan mentions measures aimed at developing indigenous manufacturing such as incentives - in the form of tax concessions and government subsidies - for development of technology and preferential purchases by government agencies of indigenously developed products and technologies. Moreover, the government will consider the use of public procurement in specified sectors with stipulation of local value addition in such areas as solar energy equipment, electronic hardware, fuel efficient transport equipment and IT based security systems. Although the NMP is still in draft status, its provisions are already being transferred to several sectoral plans. The Indian Ministry of Communications and Information Technology is in the process of finalising three separate, but inter-related, national policies concerning electronics, information technology and telecommunications which were issued in October 2011 for public comments. The Commission has already taken action in order to express the EU's concerns: Vice-President Kroes and Commissioner De Gucht sent a letter to their Indian counterparts. Moreover, in a recent visit to India, Vice-President Kroes discussed the issue with several concerned authorities.

Finally, some new measures have been introduced in the Mercosur area, with Brazil being particularly active during 2011. On 15 September 2011, **Brazil** increased the **tax on industrial products (IPI)** for manufactures of automotive vehicles and trucks that do not meet certain conditions of local production. In order to benefit from fiscal relief, 65% of the vehicles' components must be produced in Brazil; companies have to invest at least 0.5% of their gross sales in R&D in Brazil and must carry out a number of essential manufacturing processes in Brazil. The measure became applicable on 12 December 2011 and is meant to remain in force until 31 December 2012. The Commission has already bilaterally raised this issue with Brazil and in relevant WTO bodies together with other affected partners. It will remain in contact with affected firms for appropriate further action in order to minimise the negative impact for EU firms.

Brazil also **tightened** its **procedures for imports of textiles and clothing** by means of stricter customs controls. Textiles and clothing imports are now passing through the grey and red customs procedures. This means that goods are subject to physical inspection and samples can be subject to laboratory tests. As a result, time for imports to be released could take as long as 90 days (+ 90 additional days if need be). Moreover, a higher number of certificates are being requested by customs authorities.

Argentina introduced new **restrictions in the reinsurance services sector**. In February 2011, the Argentine insurance regulator (Superintendencia de Seguros de la Nacion or SSN) issued a resolution modifying the regulatory framework for reinsurance. Among its main provisions, the new regulation only authorises national companies or locally-established branches of foreign companies to provide reinsurance services in the country. By way of derogation, companies can request a waiver from this obligation when they can prove that the degree of risk cannot be covered in the local market. In May 2011, a new resolution slightly eased the regulatory framework by allowing cross-border supply of reinsurance services both for risks above USD 50 million and for retrocession services. Nevertheless, other important restrictions still remain in place, e.g. reinsurance abroad of life insurance and transfer abroad of more than 40% of premiums of local reinsurers are not allowed.

4. A TENDENCY TOWARDS TRADE-RESTRICTIVE INDUSTRIAL POLICIES IN EMERGING ECONOMIES

From analysis of the broader context of the barriers reported, it emerges that measures are often part of national industrial plans containing discriminatory provisions against foreign products, services and investment. This reflects a general tendency that has appeared in the course of the past two years, notably in emerging economies. Between 2008 and 2009, at the beginning of the financial and economic crisis, many countries resorted to public intervention in order to counter the negative effects on demand. Yet, in a number of cases, those measures did have a potential distortive effect on trade. To a certain extent, those measures were aimed at protecting sectors which were particularly suffering from the negative effects of decreasing global demand. Generally, there was a clear relationship between the crisis and the measures introduced, which were in fact meant to remain in force only temporarily while waiting for the economy to pick up.

However, the recent wave of trade-restrictive measures, notably in emerging economies, is of a different nature. The measures are no longer crisis-related since these countries have solidly recovered from the crisis and have been witnessing high growth rates (at least since 2010). Consequently, the measures concerned are not of a temporary nature, but are embedded in national industrial plans that are here to stay for longer periods and are aimed at structurally changing the production pattern of national economies building on potential comparative advantages. It is unquestionably a right of emerging economies to adopt industrial policies in order to structurally change and improve their production patterns; however, these policies should be solidly based on the principles of non-discrimination and a level-playing field.

China has a long tradition of favouring national industrial development on the basis of discrimination against foreign operators and unfair competition. This is also reflected in the **12th Five Year Plan** adopted in March 2011. The Plan represents a qualitative shift from what was considered an 'expansionist' model of development to one aiming at industrial consolidation, energy efficiency, increased productivity and an emphasis on quality upgrading with an overall objective of moving up the value chain of manufacturing and making China's growth more sustainable. In addition the 12th Five Year Plan places an even greater emphasis on the strengthening of the services sector indicating a further shift in China's policy.

Against this background, China is likely to continue providing support to selected "strategic emerging industries" (e.g. clean energy, electrical vehicles, ICT and broadband, pharmaceuticals industries), including through steering investment (often in the form of mandatory requirements for technology transfer) and financing. The 12th Five Year Plan and the provisions of the investment catalogue have already been reflected in several sectoral plans at central as well as provincial levels. As regards plans established at central level recently, the 12th Five Year Plan on National Scientific and Technological Development was issued, which is built up around the principle of enhancing independent innovation capacities. Moreover, there were indications that the new electrical vehicles plan being developed by the Ministry of Industry and Information Technology (MIIT) would mandate forced technology transfer requirements in joint ventures where foreign investors would hold a minority share. Moreover, concerns were voiced that the MIIT would introduce the requirement that by 2015 all electric cars sold in China would have to be Chinese brands. Recently however, the Chinese provided assurances that they do not intend to maintain measures mandating the transfer of technology or any requirement for foreign-invested companies to establish

domestic brands in China. In light of these positive signals and the positive steps taken on the issue of indigenous innovation, the Commission encourages China to promote innovation in respect of such principles as levelling the playing field and protection of intellectual property. At the same time, however, subsidies and export financing are still there to play a big role in fostering the innovative industrial development of the country.

The **National Manufacturing Policy (NMP)** recently introduced by **India** is another case of industrialisation policy partially based on discriminatory principles. This plan sets the target of reshaping the economic and employment landscape of India by enhancing the share of manufacturing in GDP from 16% to 25% by 2022, with a focus on indigenous production. As set out above (section 3), the plan combines elements of preference for domestic products in government procurement and local content requirements in purchases of private operators, with tax concessions and government subsidies benefitting the development of indigenous technologies. It will therefore be crucial to carefully monitor the implementation of NMP and the relevant sectoral plans[15] in terms of compatibility with international rules.

National industrialisation plans have also been recently adopted in Brazil and Argentina. In **Brazil**, for instance, the **"Plano Brasil Maior"** was adopted in August 2011 as a general plan aimed at fostering industrial development of the country. Problems arise to the extent that the plan's specific measures foresee such instruments as indirect subsidization or fiscal exemptions benefitting specific manufacturing sectors (e.g. textile and footwear, mobile and software industry, among others). One element of the Plano Maior is extension of the 25% preference margin in government procurement to the ICT sector, which is likely to be extended to other sectors such as health, defence, communications and high-tech equipment.

Argentina's trade policy has been characterised over the last years by moves towards "managed trade" and import substitution policies, including through measures affecting import and export – and NALs are certainly at the core of this policy - reflecting short-term solutions to underlying macroeconomic problems. Parts of the recently introduced **"Industrial Strategic Plan 2020"** reflect the attempt of Argentina to develop a longer term vision on such sectors as automotive, capital goods, footwear, agricultural machinery, construction materials, medicines, chemicals and textiles, but also confirm the import restricting elements described above. There is a therefore a danger that measures such as non-automatic import licensing remain in place in the future as part of a broader industrialisation policy based on import substitution.

Besides national development plans, individual trade-distortive measures are adopted with the aim of fostering industrial development also stand out in many countries. Most of the measures that are indicated as priorities in this report indeed belong to this industrialisation pattern. **Local content requirements**, often in connection with **investment** and **government**

[15] Besides the draft National Telecom Policy Plan (section 3), another relevant one is the Jawaharal Nehru National Solar Mission (National Solar Mission) adopted in 2008, which appears to condition investment in certain projects to develop solar energy infrastructure on “domestic content requirements," entailing that certain solar equipment used by developers in such projects have to be manufactured in India. Moreover, India would offer subsidised rates when purchasing solar power generated by projects under the National Solar Mission; nevertheless, developers may only get these subsidized rates if it complies with the local content requirements of the plan. Still in the field of renewable energy, the Ministry of New and Renewable Energy published draft guidelines in September 2011 requiring suppliers of wind turbine generators of a capacity in excess of 15 MW to set up manufacturing facilities in India, thereby effectively excluding foreign suppliers.

procurement, appear to be one of the most used kinds of trade-distortive instruments in the context of industrialisation. Besides the Indian National Manufacturing Policy and the related sectoral plans, another relevant measure in this respect is the so-called **localisation initiative for the automotive sector** in **Russia**, whereby foreign investors have to gradually implement local production thresholds using a defined proportion of local contents. This measure will be phased out by 2018, following Russia's accession to the WTO. Among the new measures, **Brazil's application of the tax on industrial products for automotive sector** entails local production requirements in order to benefit from a 30% reduction of the tax.

Standardisation and conformity assessment requirements also appear to be a frequently-used instrument to foster industrial development. The approach of **China** to standard-setting is a case in point. In spite of the high ambitions in terms of industrial development and innovation, China still has a very domestically-based approach to standards setting and technical requirements[16]. This represents a serious market access barrier effectively shielding domestic industry from foreign competition. The ambitious goals set in the 12th Five Year Plan of becoming world leader in certain products or sectors will require China to change its behaviour and become more integrated into the international framework of standardisation and technical rules. The case of IT security in China is an example of how the current approach to technical regulation and conformity assessment seriously hinders access to the Chinese market. On the basis of national security concerns, China has developed conformity assessment procedures requiring overly burdensome testing and procedures which, in most of the cases, must be performed by national laboratories. Moreover, in order to obtain the necessary certifications to enter the Chinese market, disclosure of proprietary information and the use of domestic technology are mandatory requirements.

The same approach is being followed by **India** in the telecommunication sector, since the original proposal of security measures for telecom equipment, which were subsequently modified, contained the requirement of source codes disclosure in order to obtain certifications. The revised proposal does represent an improvement from previous proposals; yet, it still provides for mandatory testing in Indian laboratories and other burdensome testing requirements. Additionally, the recent draft National Telecommunication Policy encourages the development of national standards and, especially for security-related aspects, the draft makes reference to the development of an Indian-specific way to technical requirements and standards setting.

Finally, the most straightforward way of protecting local production is by **restricting imports** of competing products, as well as **exports**, notably of raw material, in order to lower costs for domestic manufacturing. As regards export restrictions, there is a general upward tendency and, in fact, the WTO qualified this as one of the most worrying tendencies in trade of last year.

The examples set out above testify to the growing importance of trade-restrictive measures as elements of national industrialisation policies. This is a cause for serious concern since measures taken in the context of such plans are likely to be structural and to stay for a longer period of time. The Commission will monitor these developments very thoroughly and take appropriate action.

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[16] There are, for instance, restrictions in relation to the participation of foreign-invested companies in several sectors, ICT being one of them.

5. CONCLUSION

Ensuring access for European companies to third country markets is a central element of the external dimension regarding European policy for growth. By negotiating FTAs, engaging strategic partners in high level fora and vigorously enforcing the rights under multilateral and bilateral agreements, EU trade policy makes an important contribution to the Europe 2020 objectives of smart, sustainable and inclusive growth.

This report shows what focused action at different levels, including at the political level where necessary, can achieve in terms of removing barriers in third country markets. Moreover, concerted action of the Commission and the Member States can make a decisive difference. Where important economic interests are at stake, the Commission and Member States should not shy away from using all available means to pursue the EU's interests in a well coordinated manner. In this context, the European Council called repeatedly for improved synergies between the European Union and national levels, consistent with the provisions of the Treaties, for enhanced coordination between institutional actors, for better integration of all relevant instruments and policies, and for summit meetings with third countries to be used more effectively. The Commission and the Member States should thus continue reinforcing respective actions in a coordinated manner also by strengthening the instruments of the Market Access Partnership and by vigorously following up on the TIBR. Moreover, when the EU's partners do not respect their international obligations, recourse to dispute settlement and well-targeted retaliation, when necessary, will be on option.

The lessons learned from the cases presented in this report are clear: there are no easy solutions to many of the barriers encountered by European companies in third country markets. Removal of these barriers requires persistent and concerted action by the Commission and Member States. This work may not always be visible to the general public but it has a very concrete and tangible impact for European companies and citizens.