DIHK

STELLUNGNAHME

Brüssel, 11. April 2012

Deutscher Industrie- und Handelskammertag

Contribution to the Public Consultation of the European Commission on the EU-U.S. High Level Working Group on Jobs and Growth

The Association of German Chambers of Industry and Commerce (Deutscher Industrie- und Handelskammertag – DIHK) is the umbrella organisation of 80 Chambers in Germany (IHKs) and the worldwide network of 57 Bilateral Chambers as well as 23 own offices abroad. All companies registered in Germany, with the exception of handicraft businesses, the liberal professions and farms, are required by law to join a Chamber. Thus, the DIHK speaks fsor more than 3.6 million enterprises.

Main points of DIHK's position:

- DIHK supports the priorities identified for the High Level Working Group to concentrate on standards and regulations, tariffs, non-tariff barriers (NTBs), investments and services as well as public procurement and protection of intellectual property rights.

- The Working Group should analyse alternative approaches without being directed towards predefined results and without excluding a priori any negotiating method; it should consider alternative time frames (short, medium and long term) for the different tasks to be completed and take into account the consequences for the multilateral approach of proposed alternatives.

- As an alternative to the "single undertaking", the possibility to lead negotiations on parallel modules to be implemented separately within an overarching "umbrella agreement" should be considered.

- Feedback from German companies shows that regulatory issues are the first priority for developing better transatlantic relations.

- Agreements on tariffs should aim at cutting both agricultural and non agricultural tariffs to zero on both sides. Given the high degree of intra-firm and intra-industry trade, the elimination of tariffs should involve intermediate goods too.

- The European Union and the United States should discuss ways to bring forward liberalisation on the multilateral level of the WTO.

- The private sector and business organisations, like the Chambers of Commerce, should have an active role in shaping a new EU-U.S. initiative.

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General remarks:

DIHK generally supports free trade and considers the multilateral approach at the level of the WTO as the best way to open markets worldwide. Therefore, there is an urgent need to find a way out of the present deadlock in the Doha Negotiations. The European Union and the United States carry great responsibility within the WTO, and therefore it is crucial to discuss the question of liberalisation on the multilateral level also in the framework of the transatlantic dialogue. Indeed, the WTO remains indispensable to secure free trade thanks to its multilateral trade rules and its strong dispute settlement mechanism.

Nevertheless, in DIHK's view, multilateral agreements can be complemented by selected bilateral or regional agreements that aim at liberalising all trade in goods and services and intensifying investment relations. Given the present impasse of the multilateral negotiations in the Doha Round, there is scope to analyse the possibility of a transatlantic free trade initiative.

The European Union and the United States have a long tradition of deep economic relations. Nevertheless, there is potential to do more to facilitate transatlantic trade and investment. Therefore, DIHK welcomes the outcome of the EU-U.S. summit of November 28, 2011 as well as the results of the Transatlantic Economic Council meeting on November 29, 2011 in Washington, DC. In particular, DIHK supports the idea of a transatlantic group of experts to develop the basis for a new ambitious EU-U.S. initiative.

The creation of the High Level Working Group on Jobs and Growth (Working Group) can help to identify policies and measures to increase transatlantic trade and investment. Given the size and development level of the two economies involved, both sides could benefit from new and creative forms of agreements.

Therefore, the Working Group should:

- analyse alternative approaches for deeper transatlantic relations without being directed towards predefined results and without excluding a priori any negotiating method;
- analyse and compare different instruments;
- consider alternative time frames (short, medium and long term) for the different tasks to be completed;
- take into account the consequences for the multilateral approach of proposed alternatives;
- provide the basis for transatlantic policymakers to define form and procedures of a transatlantic initiative.

DIHK supports the priorities identified for the High Level Working Group to concentrate on standards and regulations, tariffs, non-tariff barriers (NTBs), investments and services as well as public procurement and protection of intellectual property rights.

Current standards and regulations represent the most important obstacle for German companies, followed by non-tariff barriers and sector-specific tariffs. Therefore, the first priority should be to

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identify ways and means on how broader regulatory cooperation between the EU and the U.S. can be achieved. Transatlantic commerce and investment can be enhanced by eliminating or reducing divergent regulations and standards, and by identifying emerging or high-growth sectors that may benefit from timely transatlantic regulatory cooperation. This would contribute to create jobs.

Beyond the mentioned priorities, DIHK would like to raise one more point of great relevance to German companies – and European companies in general. There is a particular need to facilitate the posting of workers for multinational companies. The Working Group should therefore consider the simplification of visa processes, especially for the "L visa".

DIHK points out that a successful new EU-U.S. initiative must rely on the experience and knowledge of the companies involved in transatlantic economic relations. Therefore, the private sector and business organisations, like the Chambers of Commerce, should have an active role in shaping a new initiative.

1. The Significance of Transatlantic Investment and Trade

The transatlantic commercial relationship is by far the largest in the world, with the U.S. and the EU surpassing $ 4.3 trillion in trade, investment and sales in one another's markets. U.S. companies have invested over $ 1 trillion in the EU. EU investment in the United States supported 3.6 million jobs in 2008.

German industry is the 4th largest source of foreign direct investment (FDI) in the U.S.: Investment volume by German businesses in the U.S. market reached $ 213 billion by the end of 2010; more than 3,400 German companies of all sizes do business in the U.S. Subsidiaries of German companies directly employ about 570,000 workers in the United States.

A recent survey[1] conducted by the German American Chambers of Commerce (GACCs) and the Representative of German Industry and Trade (RGIT) of German firms operating in the U.S. revealed that 2011 was an extremely successful year for German businesses in the U.S. 86% of German subsidiaries expect moderate to strong growth for their operations in 2012, including 67% planning to create additional jobs.

2. A new Transatlantic Economic Initiative

The decision to start a new Transatlantic Initiative should set an ambitious target but the instruments and measures should be feasible and the approach pragmatic. Procedures should be chosen so as to avoid the problems faced in the Doha Development Round and in some of the bilateral negotiations that the European Union is carrying on at present. Negotiation fatigue is to be avoided in order to exploit the favourable momentum in transatlantic relations.

- The opportunity to depart from the traditional "single undertaking" approach to trade agreements should be considered, according to which no conclusion of the negotiations and implementation of the agreement is possible before negotiations on all parts of the agreement

[1] German American Business Outlook 2011-2012, available at www.rgit-usa.com.

are successfully concluded. Some proposals, such as tariff elimination, may advance quickly; others could take more time and delay the entire project.

- As an alternative to the "single undertaking", the negotiations should pursue agreements on parallel modules to be implemented separately within an overarching "umbrella agreement" that differs from the one traditionally employed by the United States and the EU in so called deep and comprehensive free trade agreements (FTAs).

- EU should refrain from embedding the trade and investment initiative in an overarching Partnership Agreement, as it has been the case in earlier negotiations for FTAs. Traditionally, free trade agreements have been negotiated and concluded with developing countries. They included a development approach aimed at linking trade openness to political reforms or introduction of standards in the partner countries. These issues are irrelevant in the transatlantic context.

- An EU-U.S. agreement should consider the provisions currently negotiated between the EU and Canada in different fields. This is important in order to avoid new bureaucracy. The possibility to integrate provisions in place for EU-Canada and EU-U.S. relations in the future should be considered, as well as the possible inclusion of Mexico, thereby achieving an EU-NAFTA-Agreement.

- Both parties have a number of FTAs and preferential trade agreements (PTAs) with other countries and regions. In the framework of their bilateral negotiations, the EU and the U.S. should integrate and modernise their agreements with third countries. In this way, the broadest benefits of trade liberalisation can be extended to more countries by reducing the inconsistencies between these agreements.

3. The activity of the sub-groups

During the first meeting of the Working Group on 22 February 2012 in Washington, sub-groups were formed for the following issues: Conventional trade barriers, Regulatory issues, Services and Investments, Public procurement and IPR, and Customs and Trade facilitation. Subgroups on environment and labour are being planned.

As mentioned above, the analyses of the sub-groups should take into account the feasibility and the timeframe for the implementation of the instruments considered. Proposals for a modular approach should then consider priority level and timeframe for negotiations in the different fields.

DIHK received considerable feedback from stakeholders in the form of responses to a request for business feedback conducted by the German Chambers of Commerce and Industry (IHKs) and the German American Chambers of Commerce (GACCs). In the course of this inquiry, businesses in both the U.S. and Germany were queried on recent problems and issues that directly restricted their ability to operate freely in the transatlantic environment (see Annex I).

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- **Regulatory Convergence**

  Feedback from German companies shows that regulatory issues are the first priority for developing better transatlantic relations. Future standards and regulations should therefore be issued in a coordinated and harmonised way on both sides of the Atlantic.

  The United States and European Union both have highly developed regulatory systems seeking similar regulatory outcomes. However, the regulations adopted, often differ, creating divergences that unnecessarily restrict trade. Cooperation between EU and U.S. regulatory agencies has increased significantly over the past 15 years, increasing knowledge and building trust on both sides. Concerning existing standards, therefore, mutual recognition of compatible regimes has to be pushed forward – as well as the principle of functional equivalence. Mutual recognition agreements should be based on a "negative listing" approach where each other's standards would be recognised and accepted in all sectors except those explicitly exempted. Moreover, a legal mechanism for regulators to recognise the equivalence of decisions made by their transatlantic counterparts is required.

  DIHK has been a supporter of the Transatlantic Economic Council (TEC) since its creation at the 2007 EU-U.S. Summit in Washington, DC. Especially with respect to the reduction of non-tariff barriers (NTBs), DIHK considers the TEC to be an extremely important institution. Initiatives in this sector should build on a stronger TEC with the power to take binding decisions. The TEC should not dissolve within a new initiative nor should its activity be blocked in the case of the start of negotiations in other areas within a partnership agreement of any kind.

- **Conventional Trade Barriers**

  The U.S. and EU trade approximately $600 billion in goods each year. While applied tariffs are relatively low, a study by the European Centre for International Political Economy[2] shows that eliminating tariffs on such a large base would boost U.S. and EU exports by about 17%: EU exports to the U.S. would increase by $69 billion in five years, while U.S. exports to the EU would be $53 billion higher. Companies on both sides would improve their global competitiveness, and the immediate cash-flow benefits would expand investment.

  A tariff agreement should aim at cutting both agricultural and non agricultural tariffs to zero on both sides. Given the high degree of intra-firm and intra-industry trade, the elimination of tariffs should involve intermediate goods too. Concerning the definition of rules of origin, the agreement should keep the additional bureaucratic burden for businesses as low as possible and take into consideration the procedures agreed upon in the frame of the negotiations of the CETA between the EU and Canada.

  In general, given the high integration level of the U.S. and the Canadian economy, it should be possible to agree on similar certification and notification systems for the EU-U.S. and the EU-Canadian trade flows in order to keep new bureaucratic requirements to a minimum.

[2] Fredrik Erixon and Matthias Bauer: „A Transatlantic Zero Agreement: Estimating the Gains from Transatlantic Free Trade in Goods, ECIPE 2010.

- **Cross-Border Services**

  A service agreement would provide the right of establishment on a national treatment basis in all service sectors, substantially broadening the existing GATS commitments. It could also provide trader and investor visas to EU and U.S. service providers, addressing a large part of cross-border service activities.

  As in the case of standards and regulations, liberalisation in the service sector should be based on a negative listing approach. With this method, based on the goal of open service markets, both sides would agree to provide market access and national treatment to all services activities and sectors but those for which one party applies an exemption. New services emerging in the fast changing globalised world would be automatically free.

  Creating compatible regulatory regimes would help to address many obstacles to services trade, and a “Single Transatlantic Digital Market” could substantially facilitate electronic provision of services.

- **Investment**

  The U.S. and EU member states pursue similar high standards of protection in their investment agreements, although only 8 of the 27 EU member states have modern Bilateral Investment Treaties (BITs) with the U.S. At present, Germany does not have a full BIT with the United States. Portugal, Spain and Sweden do not have an investment accord of any kind with the United States.

  With the Lisbon Treaty, the European Union has been given the competence to negotiate investment agreements. This competence provides an opportunity for a new legal basis for EU-U.S. investment relations. If the European Commission receives the mandate to negotiate such an agreement between the EU and the U.S., investment protection should be set to the highest standards. The aim of the agreement should be to further liberalise transatlantic investment, including in the services sector.

  DIHK always supported the activity of Eurochambres and other European and U.S. business associations concerning the development of a Statement of Principles on the treatment of foreign investment between the United States and the European Union that embodies the highest possible standards for such investments. Therefore, DIHK welcomes the agreement reached on April 10, 2012 on a blueprint for investment principles between EU and U.S. as a first important step for deeper investment relations. Most of the cornerstone principles called for by the business associations are included in the blueprint. For the further development of the transatlantic investment relations, the contribution by the transatlantic business community can be found in Annex II.

- **Government Procurement**

  On 15 December 2011 the 42 signatories of the Government Procurement Agreement (GPS) within the framework of the WTO decided on a reform of the agreement to improve the disciplines for this key sector of the economy and expand market access coverage.

  The agreement has been expanded to new government entities including local governments and to services. China and eight other WTO members are currently negotiating accession. These negotiations should be concluded rapidly and EU and United States should push for a broader participation of more countries in the GPA.

  Any further step to open the respective public procurement markets should go beyond the actual level of openness agreed upon within the GPA and should be compatible with the results of the negotiations between the European Union and Canada in this field in order to keep information and bureaucratic costs to a minimum.

  The rules should facilitate the participation of individual U.S. states and EU Member States if there are obstacles that prevent them from participating in an agreement at federal and EU level.

4. Conclusion

DIHK calls for an ambitious bilateral initiative including all relevant areas: tariffs, non-tariff barriers, services, investment, public procurement and IPR. The instruments chosen to implement this initiative should be flexible and the approach pragmatic.

The policymakers on both sides of the Atlantic should consider all of options to boost the EU-U.S. relationship in order to produce tangible results in a manageable timeframe covering all areas identified by the Working Group.

The experience and particular knowledge of economic actors through business representatives and the private sector stakeholders in general should be taken into account. Therefore, DIHK remains at the full disposal of the Working Group to support it and its work on the different sectors.

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Annex I: Feedback from German companies in Germany and the U.S.

DIHK gathered feedback on the particular issues affecting transatlantic trade relations at present through the input of German Chambers of Industry and Commerce (IHKs), the German American Chambers of Commerce (GACCs) and their respective members. These are companies in Germany with business relations with the U.S. and German companies based in the United States.

The following input was gathered:

- Goods produced in the EU are subject to different standard certification rules than in the U.S.
  - Example: ATEX and FM norms in the EU and the U.S. Standards concerning explosion prevention and protection as well as electric shock protection are very different in the EU and U.S. Products manufactured according to EU standards must be extensively modified. The modification can make the goods' export unprofitable.
- A very relevant field, where facilitation of trade could have a major impact for German companies, is in the area of U.S. re-export control. Compliance with these provisions is time-consuming and expensive. Companies also have to consider pure U.S. legislation in this field, constantly gather information and satisfy the requirements of providers of U.S. products.
- Particularly relevant is the aspect of security regulations, air freight security, container scanning, the Authorized Economic Operator designation, etc.
- Harmonisation of vocational training standards would facilitate the recruitment of workers in the U.S.
- Visa facilitation for the temporary posting of workers, especially of highly qualified technicians without a university degree, but also for general training purposes, should be a major priority.
- Some difficulties exist with regard to the import to the U.S. of exhibits or advertisement specialties for trade fairs.
- Some U.S. rules apply only at the federal level but not in the states, e.g. U.S.-Germany Tax Convention on Income and on Capital. This causes legal uncertainty in some states.
- Different transfer pricing rules in the U.S. can cause higher costs for EU companies.
- So called "long arm jurisdiction" makes business relations more complex in order to avoid custody outreach in the EU.
- Some progress should be made in antidumping legislation. Changes in regulations made between the time an order is placed and actual delivery is made can cause problems in the certification procedures.
- Customs procedures in the U.S. are cumbersome and appear at time to be arbitrary and perhaps even capricious, according to persons and locations involved.
- Quantitative barriers to trade in the U.S. like import licenses or even import quota hamper EU exports to the U.S.
- "Buy American" clauses hinder EU exports into the U.S.
- It is often difficult to enforce legal claims and legal titles in one of the regions.
- Greater harmonising of customs tariff numbers would lead to trade facilitation.
- A further harmonisation of the Harmonized System Codes would as well lead to trade facilitation and should therefore be considered.

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Annex II

Key elements proposed by the Transatlantic business community[3] for a Joint Statement of the United States of America and the European Union Concerning Principles on the Treatment of Foreign Investment

The European Union and the United States, as the largest sources of, and hosts to, foreign direct investment, reaffirm our unequivocal conviction that foreign investment, like domestic investment, should be welcomed as a source of capital, growth, jobs, technology, innovation and productivity. These benefits are demonstrated repeatedly by the $2.34 trillion of foreign direct investment in the United States and €2.7 ($3.6) trillion in the European Union; indeed, the unique nature of our bilateral economic relationship stems in part from the fact that two-thirds of this investment is represented by the $1.93 trillion that U.S. firms have invested in the EU and the $1.48 trillion European firms have put into the United States.

Our openness to foreign investment is based on the fundamental principle that investors and their investments should be treated equally under the law regardless of nationality. Countries that adopt and adhere to this principle, as well as those that we propose herewith, will significantly assuage investors' natural concerns about putting capital into a country with which they are not familiar, thereby increasing the capital that country has available to generate growth.

Complementing the principle of non-discrimination are the measures needed to establish a favorable climate for domestic as well as foreign investment: the rule of law, transparency and predictability in government administration, regulatory fairness, the sanctity of contracts and private property, respect for intellectual property rights, and sound macro-economic policies. Governments should, therefore, ensure a minimum standard of treatment consistent with international law for all investments, including fair and equitable treatment, avoiding any semblance of arbitrary and capricious action by government officials. They should also ensure that public services such as law enforcement and fire prevention are available to provide constant protection and security for investments. Laws, regulations, judicial decisions and administrative rulings of general application should be made publicly available in a timely fashion, and domestic law should provide an effective means of enforcement of rights.

This general approach should apply to the widest possible definition of investments, including all forms of assets and tangible and intangible property; property rights such as leases, mortgages, liens and pledges; intellectual property rights; rights conferred by law or contract, such as licenses and permits; business enterprises and equity and other forms of participation in them; claims to money and to performance; and returns.

Host governments should welcome foreign investors and their investments by guaranteeing they will provide treatment no less favorable than that which they provide to their own investors and investments, and those of any third state. These basic principles of non-discriminatory national and most favored nation (MFN) treatment should apply both to the making of investments and to the subsequent management, maintenance, use, enjoyment and disposal of those investments. Key

[3] American Chamber of Commerce to the European Union, BUSINESSEUROPE, Emergency Committee for American Trade, EUROCHAMBRES, European-American Business Council, National Association of Manufacturers, Organization for International Investment, TransAtlantic Business Dialogue, U.S. Chamber of Commerce, U.S. Council for International Business.

personnel employed by investors and investments should be permitted to enter and remain temporarily in the host country to engage in activities related to the management, maintenance and other requirements of the investment. Investments should have non-discriminatory access to public procurement on all levels, and a host government should not require investments, on establishment or subsequently, to purchase, sell, transfer or provide preferences to goods, services, intellectual property, other proprietary knowledge or technology in its territory.

Where governments have delegated (formally or informally) regulatory, administrative or other authority to a state enterprise or other body, those agents should be explicitly required to uphold the host government's commitment to provide non-discriminatory treatment and other core protections to foreign investors. Governments should also seek to ensure that they take steps to eliminate competitive distortions that may be created when state-owned enterprises engage in commercial activity. In particular, in their purchase and sale of goods and services, state-owned enterprises should provide national and most-favored nation treatment to investments.

Any exceptions to these principles of non-discrimination based on the nationality of the investor should be as limited as possible, for clear public purposes, and spelled out explicitly and publicly in law and regulation.

Host governments should guarantee investors the freedom to transfer funds related to an investment into and out of their country, including capital, returns, payments, earnings, remuneration and other financial flows related to the investment, including the proceeds from its sale or liquidation.

Governments should guarantee that investments will not be expropriated, nationalized or subjected to measures having equivalent effect except when done for a public purpose, under due process of law, in a transparent and non-discriminatory manner, and with prompt, adequate and effective compensation. Compensation should reflect the fair market value of the investment before the expropriatory action became publicly known. Where an investment suffers harm from war, civil disturbance, natural disaster, state of emergency or a similar event, the host government should provide compensation or other similar benefits to the investment in a manner similar to that granted to domestic and other third country investments.

To ensure that investors are confident in their ability to enforce these rights, host governments should provide investors with the right to enter into investor-state arbitration, whether through the International Convention on the Settlement of Investment Disputes (ICSID), or any other similar neutral arbitration forum. Investor-state dispute settlement should apply as well as to enforce contacts and other agreements between foreign investors and host country governments. Host governments should also become parties to the Convention on the Recognition and Enforcement of International Arbitral Awards (the "New York Convention") to assure investors that arbitral awards can be enforced.

Countries willing to commit to these principles will significantly lower the political and legal risk investors perceive when considering bringing capital to a foreign country, and will thus benefit from additional growth, jobs, innovation and technology flows. Countries that are the sources of foreign investment also benefit greatly from the jobs and productivity enhancements overseas investments can bring.