

INTERNATIONAL COMPETITION LAW SERIES

A Concise Guide to the EU Anti-dumping/Anti-subsidies Procedures

Themistoklis K. Giannakopoulos

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Chapter I

Introduction

The European Union is committed to open markets and further liberalization of international trade. However, global markets are still threatened by unfair trading practices, such as dumping or subsidization, which can cause material injury to Community industries and put employment at risk. The European Union is therefore determined to act in order to ensure that its industries are not disadvantaged by such practices, that the Community interests are defended, and that fair competition is restored, where needed.¹

On an international level, unfair trading practices such as dumping and the granting of subsidies, were identified as a threat to open markets as early as 1947, when the first GATT agreement was signed. The agreement contained specific provisions allowing GATT members to take action against such practices in cases where these caused material injury to the domestic industry of a GATT member. Since that time, considerable efforts have been made to harmonize the rules relating to trade instruments. During the last GATT round (the 'Uruguay Round') which led to the creation of the WTO and the detailed Anti-Dumping and Anti-Subsidy Agreements, much of the attention was focused on the procedural and material conditions to be fulfilled before protective measures can be adopted. The Community played an active role in the negotiation of these relevant criteria, which are reflected in its own legislation.² The current basic texts, which form the legal basis of anti-dumping and anti-subsidy investigations in the Community, entered into

¹ European Commission *Seventeenth Annual Report from the Commission to the European Parliament on the Community's Anti-dumping and Anti-subsidy Activities*, 1998, published at the web site of DG I, p. 2.

² European Commission *Commission Staff Working Document: Annex to the 23rd Annual Report from the Commission to the European Parliament on the Community's Anti-dumping, Anti-subsidy and Safeguard Activities (2004)*, COM(2005) 360 final, published at the web site of DG I, p. 7.

force in March 1996³ and October 1997⁴ respectively. These are in line with the Anti-Dumping and Anti-Subsidy Agreements adopted during the GATT/WTO negotiations.

In 2003, two proposals of the Commission for the imposition of definitive anti-dumping measures did not find the necessary majority in the Council.⁵ It was, thus, considered necessary to introduce amendments to the then in force Anti-dumping/Anti-subsidies Regulations, in order to deal with the shortcomings in the decision-making process in the area of trade defence instruments (TDI).

The amendments concerned:

- A clarification of the way decisions were made. In the past, the Council could reject a Commission proposal without clearly taking position, either by abstaining or by expressing a negative vote. Indeed, abstentions had the same practical effects as negative votes. Under the new procedure, a Commission proposal would be adopted unless the Council decided by a simple majority to reject it. According to the Commission, this new approach does not upset the balance of responsibilities under the current system; it tackles surgically the problem at hand while respecting the simple majority principle: it ensures that an affirmative position is required by Member States to overturn a Commission proposal.
- The introduction of mandatory deadlines for the completion of review investigations: while maintaining the indicative timetable of 12 months, a mandatory deadline of 15 months was introduced for the completion of interim and expiry review investigations. For newcomer reviews and anti-absorption re-investigations, a mandatory time-limit of 9 months was proposed. While this provision will require additional human resources

³ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, O.J. L56, 6.3.96, p. 1, as last amended by Council Regulation (EC) 461/2004, O.J. L77, 13.3.2004, p. 12 (hereinafter 'the Anti-dumping Regulation').

⁴ Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidized imports from countries not members of the European Community, O.J. L288, 21.10.97, p. 1, as last amended by Council Regulation (EC) 461/2004, O.J. L77, 13.3.2004, p. 12, (hereinafter the Anti-subsidies Regulation).

⁵ *Flat-rolled products of iron or non-alloy steel (hot-rolled coils) originating in Egypt, Hungary, Iran, Libya, Slovakia and Turkey, and Rubber-grade carbon blacks*. In both cases the 15 month deadline to impose definitive measures expired, since Member States had opted to abstain from voting in the light of a Commission proposal rather than taking clearly a position in favour or against it. On the basis of the applicable decision-making mechanism, these abstentions had the effect of undermining the effectiveness of procedures. In order to address this problem, on 8 March 2004 the Council adopted Regulation 461/2004 amending the Anti-dumping and Anti-subsidies Regulations. For more details see the *Commission Staff Working Document: Annex to the 22nd Annual Report from the Commission to the European Parliament on the Community's Anti-dumping, Anti-subsidy and Safeguard Activities (2003)*, COM(2004) 828 final, pp. 36–41.

to deal with the resulting additional workload, it will be phased in, starting with deadlines on expiry reviews, and after two years, deadlines for other reviews.

- A provision for a streamlined procedure in case of withdrawal of undertakings, reflecting the principle that the Commission is the institution solely responsible for accepting and withdrawing undertakings.⁶

I. DEFINITION OF DUMPING AND SUBSIDY – CONDITIONS FOR TAKING ACTION

Dumping is traditionally defined as price discrimination between national markets, or as selling below the cost of production. The Community's anti-dumping legislation defines dumping as selling a product in the Community at a price below its 'normal value'. This 'normal value' is usually the actual sales price on the domestic market of the exporting country.⁷ Consequently, a company is selling at dumped prices if the prices on its home market are higher than its export prices (price discrimination). In the majority of the cases where dumping occurs on a more than incidental basis, a certain market segregation exists. The segregation may be due to government regulation, but also to other circumstances, including consumer preferences. As a result, exporters are shielded, at least to a certain degree, from international competition on their domestic market.

Subsidies can have similar effects as sales at dumped prices. They consist of a financial contribution from a government, which confers a benefit to producers or exporters (e.g. grants, tax and duty exemptions, preferential loans at below commercial rates). Typical examples are exports promotion schemes, which allow exporters to sell at low prices in the Community.⁸

For measures to be taken against these unfair trading practices, it is not sufficient that companies are exporting their products to the Community at dumped or subsidized prices. Measures can only be taken if these exports cause *material injury* to Community producers, which cannot compete on an equal footing with the exporters.

Typical injury indicators are that the dumped and/or subsidized import volumes increase over a certain period and import prices undercut the sales prices of the Community industry. As a consequence, the latter is forced to decrease production volumes and sales prices thus losing market shares,

⁶ Regulation 461/2004 clarified, further, a number of issues in case of an anti-absorption reinvestigation, and it rendered the provisions on circumvention more operational by clarifying, *inter alia*, the identification of practices like, notably, transshipment, slightly modified products and re-channelling of sales via the producers or exporters with the lowest duties: *Annex to the 23rd Report*, op. cit., pp. 8–9.

⁷ See also Article 1(2) of the Anti-dumping Regulation.

⁸ See also Articles 2 and 3 of the Anti-subsidies Regulation.

making losses or having to make employees redundant. In extreme cases, exporters may try to eliminate viable Community producers by using a predatory pricing strategy. In any event, the injury analysis requires that all relevant factors be taken into account before deciding whether the Community industry is in fact suffering 'material injury'.

A further condition for the imposition of measures is that the injury *must be caused* by the dumping or the subsidies, although these do not have to be the only cause of the injury. This condition is fulfilled, *inter alia*, when the injury to the Community industry coincides with the increase in dumped and subsidized imports.

Finally, it has to be established that the application of measures would not be contrary to the overall interest of the Community. In this respect, the interests of all relevant economic operators, which might be affected by the outcome of the investigation, are to be taken into account, the so-called *Community interest* test. In this context, the interest to preserve employment in the Community is carefully considered. These interests typically include those of the Community industry, users, consumers and traders of the product concerned and the analysis assesses the positive impact measures will have on some operators as opposed to the negative impact on others. Only if it can be clearly concluded that the negative impact would be disproportional, measures should not be imposed.⁹

II. BRIEF DESCRIPTION OF THE PROCEDURE

The procedure in brief, as provided for in the Anti-dumping and Anti-subsidies Regulations is as follows:

An anti-dumping/anti-subsidies case starts normally with a complaint from the Community industry, although the possibility of initiation on the Commission's initiative is not excluded. After receipt of the complaint, the Commission assesses whether the complaint contains sufficient evidence to allow for the initiation of proceedings. A case is opened by a notice of initiation published in the Official Journal. In this notice all interested parties, including users and, where appropriate, consumers' organizations, are invited to participate in the proceedings. Detailed questionnaires are sent to producers in the exporting countries and the Community, traders (in particular importers) and other interested parties, such as users. These parties are also informed that they can request a hearing and ask for access to the non-confidential files, as well as for a meeting with their opponents during the so-called 'confrontation meetings', which will help them defend their case.

Following receipt of the replies to the questionnaires, investigations are carried out by Commission officials at the premises of the co-operating

⁹ *Annex to the 23rd Report*, op. cit., pp. 11–12.

parties. The purpose of these visits is to verify whether the information given in the questionnaire is reliable. The verified information is subsequently used to calculate the dumping/subsidies margin, the price undercutting margin and the injury elimination level. These calculations often involve the processing of thousands of transactions, and require a complex analysis of production costs.

The results of the calculations and the other findings are summarized in a working document, on the basis of which it is decided – after consultation of the Member States in the Advisory Committee – whether to impose provisional measures¹⁰ or to terminate the proceedings. In either eventuality, the decision at this stage is the Commission's responsibility.

Following the publication in the Official Journal of a Commission regulation imposing provisional duties, interested parties, who so request, receive a full disclosure of the essential facts and considerations on which the Commission based its decision, which allows them to verify the calculations of the Commission and to submit comments. Comments can also be submitted during an oral hearing. All submissions and comments are taken into account when a second, definitive, working document is prepared by the Commission.

After final disclosure and consultation of the Member States on the basis of the second working document, the Commission makes a proposal to the Council whether or not to confirm the provisional measures and impose definitive measures. Another possibility is that the Commission accepts undertakings¹¹ offered by exporters. In this case, no duties are imposed for the companies from which undertakings are accepted.

The Council decides on the adoption of the Commission proposal by simple majority vote, i.e. at least thirteen Member States have to be in favour of the Commission proposal. The regulation imposing definitive duties, and deciding on the collection of the provisional duties, is published in the Official Journal. Anti-dumping or countervailing measures will normally

¹⁰ Provisional duties may be imposed if, among other conditions, a provisional affirmative determination has been made of dumping/subsidies and consequent injury to the Community industry, and if the Community interest calls for intervention to prevent such injury. The amount of the provisional anti-dumping/countervailing duty shall not exceed the margin of dumping/subsidies as provisionally established, but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry: Article 7(1) and (2) of the Anti-dumping Regulation; Article 12(1) of the Anti-subsidies Regulation.

¹¹ Investigations may be terminated without the imposition of provisional or definitive duties upon receipt of satisfactory undertakings from any exporter to revise its prices or to cease exports to the areas in question at dumped/subsidized prices, so that the Commission, after consultation, is satisfied that the injurious effect of the dumping is eliminated (additionally, in the case of subsidies, the country of origin and/or export may agree to eliminate or limit the subsidy or take other measures concerning its effects): Article 8(1) of the Anti-dumping Regulation; Article 13(1) of the Anti-subsidies Regulation.

remain in force for five years, and may consist of duties or undertakings concluded with exporters. During the five-year period, interested parties may, under certain conditions, request a review of measures or the refund of duties already paid. Measures may also be suspended for a certain period, subject to given criteria.

Schematic Diagram: How an Investigation Proceeds in Anti-dumping/Anti-subsidies Cases



