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Thinam Jakob*

Lesser Duty Rule and Community Interest in Anti-dumping Proceedings

The Community System in Perspective

The European Union's anti-dumping measures have frequently been criticised for being protectionist, violating the principles of free competition and letting the European consumer pay the bill. As against that, our author argues that the EU's highly sophisticated system merely aims at creating a level playing-field, providing for a delicate balance between the various interests involved. As long as truly equal conditions of competition are not guaranteed at world level, anti-dumping action will not lose its raison d'être.

At the international level, there is currently not the slightest doubt that anti-dumping proceedings (or anti-subsidy proceedings for that matter) may be warranted in a given situation and that, provided the substantive and procedural requirements are met, they are entirely legal. This is amply documented and proven by the WTO anti-dumping agreement currently in force¹ and by its predecessors. In this respect the Community anti-dumping legislation is the faithful mirror of this international agreement. Therefore, while one or the other aspect may merit more specific attention in the context of a new WTO round, such as the question whether some specific rules would need to be devised to better take into account special problems of developing countries, or the question of anti-circumvention proceedings, it seems safe to take the overall legality of the Community instrument (and the relevant legal instruments of all other countries applying anti-dumping legislation, such as the United States, Canada, Australia, India, Poland etc.) as a starting-point.

Obviously, there are eminent and highly respected scholars that condemn anti-dumping measures out of principle. For them, it is purely and simply a protectionist instrument, which is in flagrant violation of all principles of free competition. The scepticism of others is based on the alleged cost of anti-dumping measures for the economy within which the "protected industry" operates. Yet others take a more differentiated view in acknowledging that anti-

dumping measures may be an appropriate tool in certain circumstances but at the same time calling for an in-depth analysis of the different interests involved.

The Community System and Its Rationale

The Community system's underlying rationale is that dumping constitutes a means of unfair competition. Indeed, in the author's view, the abolition of anti-dumping would be and is entirely justified in the context of a truly liberalised regime such as can be found within the Community, or even within the European Economic Area.² In such a context, companies operating in one Member State cannot "dump" to any considerable extent in another Member State because the moment price differentiation becomes too marked, there will be re-imports at lower prices into the country of origin destroying the gains used by the dumping company to keep its overall profits stable. And to the extent that companies try to circumvent open trade by territorial or other cartel agreements, Articles 81 seq. of the EC Treaty (and the corresponding provisions of the mentioned Agreement on the European Economic Area) provide the means to the European Commission to put an end to such practices. However, to the extent such truly "equal conditions of competition" are not guaranteed at world level, anti-dumping action has not lost and will not lose its "raison d'être".

¹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, reprinted in OJ L 336, 23.12.1994, p. 0013.

² So-called EEA Agreement, published in OJ L 001, 03.01.1994, p. 0003.

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Fair Competition

The Community system is thus geared to ensure "fair competition" on the Community market or, in other words, equal conditions of competition. It should be noted that "fair" in this context should be understood as aiming at the creation of a level playing-field. Vehement opponents like to accuse the Community – or any other country applying an anti-dumping instrument – of being blindly protectionist in closing the frontiers to imports, letting the consumers pay the bill. However, a more level-headed approach will show that the quoted high duties are rather the exception in practice and as a rule applied to exports from those companies which have not availed themselves of the possibilities of cooperation offered to them in each individual proceeding. Thus, contrary to what may be alleged, lower raw material or labour costs will not be a criterion for imposing any measures as these are considered to be natural or competitive advantages. Relevant criteria will only be related to questions of price comparison, i.e. whether the exports into the Community are made at price levels lower than representative profitable domestic sales of the exporters concerned, or whether the sales are below cost. This means that anti-dumping duties – or undertakings – are aimed to eliminate any advantages of exporters which are internationally considered as unfair, nothing more and nothing less.

Lesser Duty Rule

If measures are aimed at eliminating certain unfair advantages, another clarifying word seems to be appropriate. The system of the United States, for instance, contents itself with establishing the dumping margins of the exporters concerned and the finding that the dumping found has caused the injury suffered

by the domestic industry. If that is the case, measures are imposed without further ado based on the dumping margin, even if a lesser duty would be sufficient to remove the injury. This, it should be noted, is entirely legal and in conformity with the WTO agreement.

The Community system, similarly for instance to the Australian system, provides for a more differentiated solution in having established the "lesser duty rule", which is foreseen only as an option in the WTO agreement. This means that even where the dumping margins are high, but where it is found that a "lesser duty" would be sufficient to ward off the injury suffered and/or likely to be suffered by the Community (or domestic) industry, only the lesser duty will be imposed and *vice versa*. It should be noted that in the course of the last ten years, around 40% of the duties imposed were based on the so-called injury margin and not on the dumping margins found.³

Community Interest

Finally, the most specifically prominent feature of the Community's anti-dumping legislation consists in its provision for a so-called Community interest (or public interest) test, which can be found, but to a less pronounced degree, in the Canadian anti-dumping legislation. In other words, the Community has availed itself of yet another optional provision of the WTO agreement. The Community institutions, before imposing anti-dumping measures in any given proceeding, have to ensure that there are no

³ Cf. the Annual Reports from the Commission to the European Parliament, for instance the most recent Eighteenth Annual Report from the Commission to the European Parliament on the Community's anti-dumping and anti-subsidy activities – Overview of the monitoring of third country safeguard cases and of the implementation of the trade barriers Regulation (1999), published on 11.07.2000, COM (2000) 440 final.

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Kirsten Heppke

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compelling reasons, in the Community interest, that would speak against the imposition of measures, i.e. that the disadvantages to certain interested parties would be clearly disproportionate by comparison to any advantages given to the Community industry by the imposition of measures. It should be noted that such an obligation incumbent upon the Community institutions has been included in the Community legislation from the beginning, whereas the criteria have been developed over time and have received clarification upon the adoption of the current so-called "Basic Regulation"⁴ after the conclusion of the Uruguay Round.

The Legal Basis

The legal basis for the Community interest can now be found in Article 21 of the Basic Regulation. Article 21(1) reads:

"A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests as a whole, including the interests of the domestic industry and users and consumers; and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of the dumping and the injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures."

⁴ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ L 056, 6.3.1996, p. 0001, as last amended by Regulation (EC) No 2238/2000 (OJ L 257, 11.10.2000, p.2.)

⁵ Cf. e.g. Commission Decision of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, OJ L 041, 12.02.1994, p. 0050, where it was found that the negative effects of anti-dumping measures on the users of gum rosin would be overwhelmingly disproportionate to the benefits arising from anti-dumping measures in favour of the Community industry. As far as the latter is concerned, it consisted of medium-sized firms, solely in one Member State, which made use of a limited natural resource. If anti-dumping measures had been imposed, the Community market would have continued to be largely dependent on imports, since the Community industry's capacity of production could cover only a minority share. In contrast, gum rosin was a primary product used in numerous industries, based in most of the Member States, where they represented a high added value and supported a large number of jobs. The imposition of anti-dumping measures would have resulted, for these companies, in a substantial increase in the respective costs of production of the above products and would have jeopardised the situation of these industries.

This Article gives a rather clear guidance as to which interests are considered, once injurious dumping and thus the need to impose measures in principle have been established: those of the Community industry, the users, the consumers, and the – more general – interests in eliminating trade distortion and restoring effective competition. On the basis of these criteria it is clear that it must be the Community institutions' task to investigate the economic interests of the players on the market (in this respect it has become the practice to also take into account the interests of Community suppliers and of traders/importers of the product concerned, given that they as well may be sharply affected by measures), having regard to the need to eliminate the trade distorting effects of injurious dumping and to ensure undistorted competitive conditions on the Community market, and in their final assessment to balance the possibly conflicting interests.

In practice, Community interest was in several cases either the main or one of the reasons for the termination of proceedings without imposition of measures.⁵ In other cases, while Community interest was an important issue, the Community institutions finally decided to impose measures.⁶ Finally, in some cases, measures have not been imposed because of what could be termed Member States' own conception of Community interest,⁷ or simply because a necessary majority for the Commission's proposals was not found.⁸

The Interests at Stake

With respect to the interests at stake, it will firstly be considered whether the imposition of measures would

⁶ Cf. e.g. Council Regulation (EC) No 2263/2000 of 9 October 2000 imposing a definitive anti-dumping duty on imports of black color-formers originating in Japan, OJ L 259, 13.10.2000, p. 0001, where it was concluded that the imposition of an anti-dumping measure would benefit the Community industry in terms of an increase in its prices and a certain increase in the sales and production volume and therefore an improved financial situation. In turn, the non-imposition of measures could result in the medium term in the Community industry's withdrawal from this market. On the other hand, the imposition of an anti-dumping measure was unlikely to significantly affect the economic situation of importers/traders and moderate price increases which could result from the imposition of the anti-dumping measures proposed were not likely to endanger the economic activities of users concerned.

⁷ Cf. e.g. Council Regulation (EC) No 174/2000 of 24 January 2000 repealing Council Regulation (EEC) No 3433/91 insofar as it imposes a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, OJ L 022, 27.01.2000, p. 0016. In this case, the Commission concluded that there was likelihood of recurrence of injurious dumping and in April 1999, made the second of two proposals to impose a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan. However, the appropriate majority in the Council was not achieved to adopt a Regulation on the basis of either Commission proposal. The Commission thus proposed the termination of the measures, which the Council accepted.

be in the interest of the Community *industry*. In this respect, generally there will be a certain presumption that measures would enable the Community industry to recover from the injury suffered and thus be in their interest.

Concerning Community *suppliers*, it should be noted that it is the institutions' practice to take into account principally the interests of Community-based direct suppliers of raw materials for the Community industry. Producers of manufacturing machinery, for instance, would as a rule not be taken into account as interested parties because they are only indirectly and not materially involved in the production chain. The focus of the investigation would in this instance be the dependence of the Community suppliers on their clients (i.e. the Community industry), and to what extent they have been and/or would be affected by the economic difficulties of the Community industry.

Traders/importers will likewise be investigated as to their – economic – interests at stake, which may vary according to the volumes of dumped products traded/imported and their possibility of finding other sources of supply for the product under consideration. As to users, those invited to cooperate will as a rule be the first – industrial – users in the chain, or those being able to demonstrate an objective link⁹ with the product concerned by the investigation. Again, the main issues investigated will be the impact of anti-dumping

measures on their costs of production¹⁰ and thus on their competitive position on the market of the transformed/finished product. The Community institutions will also consider whether sufficient supply of the product concerned will be ensured.¹¹

Consumers and their representative organisations have so far been considered as interested parties mainly where typical consumer products are at stake, as in the sector of consumer electronics. However, they will also be considered interested parties for other products provided an objective link can be established.¹² In the decision as to whether measures should be imposed or not, the overall effects of the possible duties and any possible price-rises,¹³ taking into account the realistic possibilities of consumer choice,¹⁴ will be evaluated to the extent possible.

Finally, account will be taken of the competitive *conditions* on the Community market. While the starting-point would generally be that measures help to restore equal conditions of competition, competition aspects would certainly speak against the imposition of measures if the Community industry had been convicted of abuse of dominance or of cartelisation with respect to the product concerned¹⁵ and if, for instance, the lodging of an anti-dumping complaint, seen in this context, could be taken as yet another sign of illicit collusion.¹⁶ On the other hand, the fact that there would be only one Community producer on the Community market, even if he were considered to enjoy a dominant position, cannot as

⁸ For instance in the so-called cotton case, cf. Commission Regulation (EC) No 773/98 of 7 April 1998 imposing a provisional anti-dumping duty on imports of certain unbleached cotton fabrics originating in the People's Republic of China, Egypt, India, Indonesia, Pakistan and Turkey, OJ L 111, 09.04.1998, p. 0019. An appeal by the complainant is currently pending against the "non-decision" of the Council.

⁹ See Case T-256/97, *Bureau européen des unions des consommateurs (BEUC) v Commission of the European Communities*, 27 January 2000, ECR 2000, page II-0101, where the CFI annuls a Commission's decision refusing to recognise the applicant as an interested party. The CFI considers that in order to be considered an interested party for the purposes of an antidumping proceeding, it is necessary to prove that there is an objective link between the party's activities, on the one hand, and the product under investigation, on the other. In this case the CFI found that the consumer organisation was an interested party.

¹⁰ However, the simple fact that the imposition of anti-dumping measures will increase the prices charged to users of the product concerned is in this context not in itself a reason that measures would not be in the interest of the Community since the low prices are only the result of unfair competitive behaviour.

¹¹ However, it has been held that the fact that Community producers cannot satisfy demand on the Community market fully is not in itself a reason to consider the imposition to be against Community interest (cf. e.g. Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanalamine originating in the United States of America, OJ L 195, 04.08.1993, p. 0005) This is in particular true when the anti-dumping measures would not present an obstacle to satisfying the gap in demand with supplies from third countries at fair prices.

¹² See Case T-256/97, as quoted.

¹³ However, where the products concerned are inexpensive and the individual additional charge to the consumer due to the antidumping measures will likely be very low, the minor price increases will not weigh heavily when assessing Community interest. For example in pocket lighters from Japan (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, OJ L 133, 28.05.1991, p. 0020) the products concerned were inexpensive and the individual additional charge for the consumer (due to the measures) would have been very low. The Community institutions also consider whether the low prices of dumped imports would really be passed on to the final consumer or whether importers and traders would use the lower prices as a means of enjoying increased profit margins (cf. e.g. Commission Regulation (EC) No 209/97 of 3 February 1997 imposing a provisional anti-dumping duty on imports of certain handbags originating in the People's Republic of China, OJ L 033, 04.02.1997, p. 0011).

¹⁴ In photo albums from Hong Kong and South Korea (Commission Decision of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, OJ L 138, 31.05.1990, p. 0048) the consideration of sufficient supply for consumers played a decisive role. That proceeding covered both book-bound and non-book-bound photo albums. However, the supply by the Community industry of cheap non-book-bound albums was insufficient and therefore a shortage in overall supply would have been likely if protective measures had been taken. It was decided to limit anti-dumping measures to book-bound albums.

such, in the author's view, be used as an argument against the imposition of measures as competition law does not consider the mere existence of a dominant position to be illicit and since therefore there are no reasons to deny such a company the right to combat unfair trade practices.¹⁷

The Evaluation Process

Once the above interests have been investigated and analysed, the Community institutions need to establish an overall assessment and balance the interests one against another. The assessment of the impact on users must be made in the light of the proportionality test. In other words, it must be found that the disadvantage to users/consumers and other interested parties would be clearly disproportionate to any advantages given to the Community industry by the imposition of measures. One main factor in this context will be the question of employment safeguarded versus the employment endangered. It will also be analysed whether possible reductions of choice, cost rises for users and/or price rises for consumers must be considered disproportionate in view of the benefits that can reasonably be expected from the measures. Finally, the procedural rights of the parties concerned must be taken into account.¹⁸

In this respect, the criticism has often been that certain aspects have not been sufficiently investigated and that as to future developments, a certain amount of guesswork would be involved. It is true that the Community interest test does necessarily involve a certain measure of prognosis, to which a risk of wrong assessment is inherent.

However the applicable methodology is clearly set by consistent practice and given the diversity of situations analysed it is obvious that the interpretation of the facts may vary from case to case. One of the major difficulties for the investigating authorities is the fact that cooperation from the economic operators is

frequently deficient, which poses a dilemma because just as exporters can take the authorities to Court if they feel measures have been imposed on an insufficiently verified basis, the same is true for the Community industry which could claim that a refusal to impose measures was based on insufficiently verified facts and considerations. However, it appears quite clear that the Basic Regulation requires an analysis of the interests of the economic operators likely to be directly affected by any decision, thus excluding any overall macro-economic cost-benefit analysis which in any event would be impossible to realise within the deadlines that have to be met and which in consequence is not applied by any user of an anti-dumping instrument.

Conclusion

In conclusion, it seems that the Community anti-dumping system can be considered as a highly sophisticated one, providing for a delicate balance between the interests of the domestic industry to be safeguarded from unfair trade practices, the interests of the Community's trading partners in applying the lesser duty rule thus ensuring that duties are imposed only to the extent necessary to remove any injury suffered, and the interests of other economic operators in the Community that might be negatively affected by measures.

More specifically with respect to the Community interest test, the Community approach would appear to have the advantage that it clearly sets out the – purely economic – interests involved, which ensures a transparent and foreseeable application of the principles. However, there is certainly room for improvement at least in the sense that the investigating services would need to make greater efforts to convince the economic operators concerned of the values of full cooperation.

¹⁵ Cf. e.g. Case C-358/89, *Extramet Industrie SA v Council of the European Communities*, 11 June 1992, ECR 1992, p. I-381, where the Court annulled Regulation No 2808/89 on the grounds that the Community institutions had not actually considered whether the Community producer referred to in the regulation in question had by its refusal to sell itself contributed to the injury suffered.

¹⁶ Cf. e.g. Case T-2/95, *Industrie des Poudres Sphériques v Council of the European Union*, 15 October 1998, ECR 1998, p. II-3939, where the Court considers that it would have been particularly ill-advised for the sole Community producer to lodge a new anti-dumping complaint when the French Conseil de la Concurrence had just ruled that the Community producer had abused a dominant position and when appeals against that decision were pending since the lodge of a new complaint would provide the Paris Cour d'Appel with evidence in support of the other party's arguments.

¹⁷ Cf. e.g. coumarin from P.R. China/imposition of definitive measures (Council Regulation (EC) No 600/96 of 25 March 1996 imposing a definitive anti-dumping duty on imports of coumarin originating in the People's Republic of China, OJ L 86, 04.04.1996, p. 0001) where one user maintained its allegation concerning the threat of abuse of a dominant position by the Community producer in relation to its marketing policy, consisting allegedly of guaranteeing the delivery of a predetermined volume of coumarin only to users which agree to enter into a five-year purchase contract. These arguments were rejected on the grounds that the Community producer had a much lower market share than Chinese imports and it has been found that the marketing policy in question had not been implemented at all.

¹⁸ The parties mentioned in Article 21 of the Basic Regulation have the right to make submissions on Community interest, to consult the file on Community interest, to respond to submissions contained in the file, to request a hearing, to make submissions on the application of a provisional duty, to inspect other parties' non-confidential submissions and to have a disclosure of the final findings.