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Francis Sarre\*

## Article 115 EEC Treaty and Trade with Eastern Europe

*Article 115 EEC Treaty enables a member state to block indirect imports of goods stemming from countries outside the Community which have first been imported by another member state, and thus helps to preserve the existence of national commercial policies as opposed to a uniform Community system. The following article examines the application of Art. 115 to the Community's trade with Eastern Europe.*

The European Community's commercial policy measures with regard to Eastern European countries<sup>1</sup> basically take two forms. First there are agreements between the European Community and Eastern European countries and secondly there are measures taken unilaterally or autonomously by the Community vis-à-vis these countries. Within these régimes safeguard measures have been included which affect *direct* imports into the Community.

Besides these safeguard measures with respect to direct imports of products originating in Eastern Europe into the Community<sup>2</sup> there is also an intra-Community safeguard clause which can block *indirect* imports of these goods from one member state into another. The legal basis for the application of this safeguard mechanism is Article 115 EEC Treaty. Normally speaking, goods originating outside the Community acquire Community status when brought into free circulation in one of the member states.<sup>3</sup> This implies inter alia that they are no longer subject to quantitative restrictions or measures having equivalent effect within the Community.<sup>4</sup> However, this principle can only be applied to the full if a common commercial policy at EEC level has been installed. If the member states choose to retain individual quotas for certain goods originating in third countries then it would be easy just to import those goods via a member state which does not impose similar external restrictions. Art. 115 can remedy this and is designed to protect national commercial policy measures where trade deflection occurs and when

differences in those measures lead to economic difficulties.<sup>5</sup> Under conditions laid down in Decision 87/433 of 22 July 1987, taken by the Commission implementing Art. 115, a member state can apply to the Commission for authorisation to introduce either protective measures, or intra-Community surveillance measures to monitor the flow of indirect imports.<sup>6</sup> Such measures usually consist of the Community allowing member states not to apply Community treatment to the goods concerned.

<sup>1</sup> The Eastern European countries referred to are the European members of the CMEA: the USSR, Bulgaria, Czechoslovakia, the GDR, Hungary, Poland and Romania. Yugoslavia is not included in this study.

<sup>2</sup> See for example Art. 11 of Regulation 1765/82 O.J.1982, L 195/1.

<sup>3</sup> Art. 10 EEC Treaty.

<sup>4</sup> Art. 9 (2) EEC Treaty.

<sup>5</sup> Although Art. 115 can be understood in the sense that these two situations (deflection of trade and differences leading to economic difficulties) provide an alternative reason for application. I strongly believe that they require cumulative application as the former invariably leads to the latter. This is also in line with the Court of Justice's thinking when it requires Article 115 to be strictly interpreted. See European Court of Justice (1971) ECR 900, (1976) ECR 442, (1976) ECR 1937; see also Commission Decision 87/433 governing the application of Art. 115, O. J. 1987, L 238/26. However, the Commission has made an exception in allowing the application of Art. 115 to bananas imported from the "dollar zone" countries. As there is no national production in one of the applicant member states no economic difficulties can be established. Nevertheless, Art. 115 has been deemed necessary to ensure that certain obligations towards ACP countries are fulfilled (see Protocol 4 to the Second Lomé Convention).

<sup>6</sup> O. J. 1987, L 238/26. The authorisation of surveillance measures is granted on an individual basis or for a group of member states in a "global" Commission Decision. See for example O.J.1985, L 178/17. The scope of the new Commission Decision is also extended to indirect imports which cause economic difficulties due to differences in external tariffs. These differences are caused by the new member states being allowed to continue to apply more favourable tariffs to goods imported from outside the Community. For an application of Art. 115 where these circumstances arise see O. J. 1987, L 146/61. In this instance acetic acid originating in the United States was imported into France via Spain.

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Art. 113 EEC Treaty which provides for the establishment of a uniform common commercial policy (hereafter CCP) is therefore inextricably linked to Art. 115. Once a CCP has been completed, then logically Art. 115 should become redundant. This article will endeavour to examine to what extent a uniform Community system has replaced national commercial policy measures in respect of Eastern European countries.

For the member states of the European Community commercial policy with regard to Eastern European countries has always played an important role in attaining political objectives.<sup>7</sup> So much so that a transfer of competence to the EEC institutions has not always

been an avidly accepted proposition.<sup>8</sup> This was borne out by the fact that the transitional period for the establishment of a CCP with regard to Eastern European countries had to be extended beyond the set target of 1st January 1970: from 1st January 1973 onwards member states were no longer allowed to negotiate bilateral agreements with Eastern European countries and existing bilateral agreements expired on 31st December 1974 leaving full competence in the hands of the Community from 1975. By this date, however, a completed common commercial policy still did not exist, but due to the exclusive competence of the Community, national commercial policy measures could

<sup>7</sup> See in particular the contributions at the colloquium "The Political and Legal Framework of Trade Relations Between the European Community and Eastern Europe" on 17-18th December 1988 at the University of Ghent. The reports of this colloquium will be published by Martinus Nijhoff, Dordrecht, The Netherlands, in the latter part of 1988.

<sup>8</sup> J. Pinder: How active will the Community be in East-West Economic Relations?, in: I. John: EEC Policy towards Eastern Europe, Westmead, Saxon House, 1975, p. 71.

<sup>9</sup> E. L. M. Volker: Major instruments of the common commercial policy, in: Protectionism and the European Community, Deventer, Kluwer, 1987, p. 35.

#### PUBLICATIONS OF THE HWWA-INSTITUT FÜR WIRTSCHAFTSFORSCHUNG-HAMBURG

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(Ed.)

## REGULIERUNG IN DER BUNDESREPUBLIK DEUTSCHLAND

Die Ausnahmehbereiche des Gesetzes gegen Wettbewerbsbeschränkungen

## REGULATION IN THE FEDERAL REPUBLIC OF GERMANY

The Exceptions in the Law against Restraints to Competition

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only be furthered by virtue of specific Community authorisation.<sup>9</sup>

Having been unable to conclude comprehensive trade agreements with Eastern European countries, the Community resorted to introducing an autonomous import régime. The reason for this inability was mainly political: the Eastern European countries and the CMEA had for a long time refused to recognise the Community and therefore its exclusive powers as regards commercial policy.<sup>10</sup>

At the moment this autonomous régime includes inter alia two basic Community regulations which specifically govern trade between the EEC and state-trading countries as a group. First, Regulation 1765/82<sup>11</sup> which contains a list of imports not subject to quantitative restrictions and a procedure for the application of safeguard measures which allow protection to be restricted to certain regions only and secondly, Regulation 3420/83<sup>12</sup> which governs the products not liberalised at Community level, providing a list of retained national quotas as well as a procedure for their amendment. Art. 3 of Regulation 3420/83 also requires the Council, before the 1st of December of every year, to lay down the quotas which the member states are authorised to maintain in the following year with regard to the state-trading countries which come under the regulation. These quotas are in effect the quantitative restrictions which the member states of the EEC had agreed upon in their bilateral agreements with individual CMEA member states.<sup>13</sup>

Besides the two above-mentioned basic regulations specifically dealing with state-trading countries a separate general regulation governing the distribution of imported textiles from outside the Community also affects imports from certain Eastern European countries. The import regime of these goods is governed by Regulation 4136/86. This complex regulation covers

the administration of subquotas which have been distilled from a global Community quota agreed upon with the various parties to the Multifibre Arrangement concluded under the auspices of the GATT (see below).<sup>14</sup> It is in this sector that the application of Art. 115 is most prolific and where the question can be asked whether the division of subquotas by the Community or "burden sharing" justifies the continued application of Art. 115.

For those Eastern European countries which are not, however, members of the GATT or have not concluded an agreement within the framework of the Multifibre Arrangement, the quantitative restrictions for textile products are to be found in the annual Council decisions taken pursuant to Regulation 3420/83.<sup>15</sup>

### Recent Developments

By the beginning of the 1980's the application of Art. 115 with regard to goods originating in third countries in general had assumed alarming proportions. The indirect importation of cheap goods from state-trading countries – mainly Eastern European countries including Yugoslavia but also China – accounted for approximately one third of the authorisations to introduce protective measures. Significant overall reductions in authorisations in 1981 and 1983 also meant a reduction in the application of Art. 115 with regard to Eastern European goods. Since 1983 the number of requests granted for the application of protective measures with regard to Eastern European products under Art. 115 has decreased. In 1983 for example, 32 requests were granted, but from then on the number decreased progressively to 30 and 28 in 1984 and 1985 respectively, dropping to 15 in 1986 and 12 in 1987. One explanation for this downward trend is possibly the reduced volume of imports from Eastern Europe into the Community or perhaps even the improved state of some of the Community industries that had earlier felt the need for protection.

<sup>10</sup> J. Maslen: *The European Community's Relations with State-trading Countries 1981-83*, Yearbook of European Law, Oxford, Clarendon Press, 1984, pp. 324-345. In 1974 the Community offered state-trading countries a model agreement incorporating a most favoured nation clause and covering all fields of trade. Only China and later Romania responded. The EEC subsequently resorted to an autonomous import régime. See G. Lysen: *EEC-CMEA/Eastern Europe, Legal Aspects on Trade and Co-operation*, Legal Issues of European Integration, 1987, p. 98.

<sup>11</sup> O. J. 1982, L 195/1. This regulation governs the imports of goods from 11 state-trading countries excluding China for whom a special regulation exists, namely Regulation 1766/82. These countries are Albania, Bulgaria, Hungary, Poland, Romania, Czechoslovakia, the GDR, the Soviet Union, Vietnam, North Korea and Mongolia.

<sup>12</sup> O. J. 1983, L 346/6 (amended by Regulation 2273/87 O. J. 1987, L 217/1). This regulation also applies to the quantitative restrictions maintained vis-à-vis China.

<sup>13</sup> In cases of extreme urgency member states can also without immediate Community intervention autonomously apply a safeguard clause based on Regulation 3420/83 (see Art. 10). This competence must be deemed contrary to Art. 113 as interpreted by the European Court of Justice. See C. W. A. Timmermans: *Community Commercial Policy on Textiles: A Legal Imbroglio in Protectionism and the European Community*, Deventer, Kluwer, 1987, p. 164. However, member states usually amend or introduce quotas with Community approval (see Art. 9). As opposed to cases where the member states can act autonomously, Art. 115 has been applied in cases where the Community has approved the use of the safeguard clause. See O. J. 1987, L 146/63.

<sup>14</sup> Regulation 3589/82 O. J. 1982, L 374/106 amended by Regulations 4136/88 O. J. 1986, L 387/42 and 768/88 O. J. 1988, L 84/1.

<sup>15</sup> For the quotas laid down for 1987 see Council Decision 87/60 O. J. 1987, L 31/87, amended by Council Decision 88/83 O. J. 1988, L 43/1.

Nevertheless, with a view to better trade relations with Eastern European countries and a potential increase of imports from Eastern Europe in the future – although perhaps not in the immediate future – as well as the need to achieve a more coherent Community commercial policy in the context of a single market, the total elimination of Art. 115 still remains an important issue.<sup>16</sup>

### Textiles

The large majority of goods restricted within the Community by Art. 115 are textiles. For example, in 1987 of the 12 requests granted 10 concerned textiles. The amount of textile products allowed into the Community from Eastern European countries has been laid down in agreements concluded by the Community with each Eastern European member country of the GATT (Czechoslovakia, Hungary, Poland and Romania) as well as Bulgaria with whom a special agreement was concluded. These agreements contain a voluntary undertaking on the part of the third country involved to restrict its exports to the Community. As already mentioned above the quotas agreed upon are subsequently divided up among the member states and administered by Community regulation. The fact that the Community itself has assumed competence in this field makes it doubtful whether Art. 115 – which is designed to protect *national* commercial policy measures – can still be applied. On the other hand the textile products which fall under decisions taken pursuant to Regulation 3420/83 are in essence national measures authorised by the Community; therefore, the same uncertainty about their validity does not exist.

### Industrial Products

As far as industrial products are concerned all the applications for Art. 115 involve quotas which have been set pursuant to Regulation 3420/83. As the listed national quotas are mentioned separately for each member state, there can be no doubt that specific Community authorisation as required by the European Court of Justice has been given. However, the Council when setting these quotas must make sure that it continuously determines whether they can justifiably be maintained: with a single market as objective a gradual dismantling of national quotas should be aimed at.

The industrial goods mainly affected are motor vehicles and ball-bearings from the Soviet Union, shooting cartridges and fluting-paper from Czechoslovakia, window panes from Hungary and glassware, tubes and pipes from Romania.<sup>17</sup>

As regards these kinds of goods it should also not be forgotten that a trade agreement was concluded in 1980 between the Community and Romania.<sup>18</sup> The goods which have been affected by Art. 115 are not liberalised by the agreement but still appear in the agreement as goods subject to quantitative restrictions which the Community acknowledged could not be abolished for the duration of the agreement. These quantitative restrictions are those referred to in Art. 3 of the Protocol of Accession of Romania to the GATT and which contracting parties agreed to abolish without however setting a date for their final and total elimination. Besides liberalising products at Community level the agreement also provides the suspension or abolition of quantitative restrictions at regional level. Although Art. 115 has not yet been applied to these products, recent case-law seems to suggest that the possibility cannot be ruled out. Regulation 1765/82 remains applicable to the products liberalised at Community level allowing regional protection to be introduced, which in turn could be bolstered by Art. 115. Also, abolition or suspension at regional level implies the furtherance of quantitative restrictions in other member states which could be evaded by indirect importation.

### Prospects for the Future

It is interesting to note that not all the member states of the European Community have asked for the application of Art. 115 with the same vigour. Over the past few years it has been France and Italy who have most frequently asked – and have received authorisation – for the application of protective measures under Art. 115 with regard to Eastern European goods.<sup>19</sup> In France's case Romanian textile products have been hit most often, whereas Italy has continuously sought to block indirect imports of motor vehicles and ball-bearings from the Soviet Union. Bearing in mind the eventual economic and social repercussions for these countries the removal of Art. 115 must imply that other remedial measures are taken, this time at Community level: an efficient Community social and industrial policy geared to the needs of those

<sup>16</sup> O. J. 1980, L 352/5; cf. J. Martonyi: Eastern European Countries and the GATT in the Political and Legal Framework of Trade Relations between the European Community and Eastern Europe, Ghent Coll. 1987; see footnote 7.

<sup>17</sup> See for example O. J. 1983, C 276/4; O. J. 1984, C 321/3; O. J. 1985, C 121/6; O. J. 1985, C 142/14; O. J. 1986, C 97/5; O. J. 1987, C 17/2; O. J. 1987, C 283/2.

<sup>18</sup> O. J. 1980, L 352/5.

<sup>19</sup> In 1985 out of the 28 authorisations granted with regard to Eastern European goods France received 12 and Italy 6, in 1986 out of 15 authorisations France received 7 and Italy 4 and in 1987 out of 12 authorisations France received 6 and Italy 4.

countries' industries under threat can and should be considered.

All in all there does not seem to be as yet any prospect of the total elimination of Art. 115. It remains a useful protectionist instrument to shield struggling national industries from cheap imports originating outside the Community. The Commission's White Paper on the Completion of the Internal Market acknowledges that some of the problems regarding barriers to trade within the Community are linked to the establishment of a true common commercial policy which would mean the total removal of competence from the member states to the Community institutions;<sup>20</sup> it does, however, admit that difficulties will be encountered, which seems to defer any decisive step even further into the future. Domestic political pressures still present obstacles to quick change.

A positive, but still only preliminary, step has nonetheless been taken by the Commission in introducing a new decision on the implementation of Art. 115, imposing more stringent requirements for its application.<sup>21</sup> For example, when the threat of economic difficulties arises surveillance measures under Art. 115 can only be authorised if it can be shown that imports actually do create a serious risk,<sup>22</sup> a prerequisite which was lacking in the previous Commission decision implementing Art. 115. Also, when applying for authorisation to introduce protective measures, besides having to provide the information as previously required under the old Decision 80/47, member states now also have to show that progress is being made at national level to alleviate the sectoral problems which called for Art. 115.<sup>23</sup> It remains to be seen however, how this condition will be put into practice by the Commission.

From a purely constitutional point of view in order to fulfil the basic objectives of a common market a CCP must be realised.<sup>24</sup> To continuously apply Art. 115 seriously undermines any real progress towards this aim and makes member states even more reluctant to discard it as a means of protecting their own markets. On the other hand, the withdrawal of the possibility of applying Art. 115 could result in an unwillingness within the Council of Ministers to reach concrete decisions on the establishment of a common commercial policy with

which everybody is satisfied.<sup>25</sup> Indeed, some countries' national industries rely on the importation of some goods for assembly and therefore need to be able to rely on reasonable levels of imports, while manufacturing industries in other countries continue to oppose higher quotas of goods which directly compete with their own. To reach a compromise is – according to this point of view – all the more difficult if Art. 115 can no longer be applied. Although this argument is attractive it is mainly based on political and economic considerations and lacks legal foundation.

### Contentious Issues

Controversy still remains about the circumstances in which Art. 115 can be applied. At first sight, where the Community has granted regional protection on the ground of a safeguard clause laid down in regulation or agreement or has divided a global Community quota into subquotas amongst the member states, it is doubtful whether Art. 115 can still be applied. The wording of Art. 115, which allows its application to protect *member states'* commercial policy measures, would tend to provide a negative answer. Where the Community has taken steps in the area of commercial policy, all paths for action by member states to restrict imports within the Community should be cut off. A solution to problems has to be sought at Community level.<sup>26</sup> This is, however, not the viewpoint of the European Court of Justice which in two recent cases (see below) stressed the importance of the existence of "uniform conditions of importation" irrespective of the fact that the Community had acted.

### Regional Protection

Regional protection can be effected by introducing national quotas limited to one or a few member states by Community decision, access to other markets in the Community remaining unrestricted. As a protective measure in its own right regional protection is very effective if Art. 115 is available. It in fact provides a compromise between countries accepting liberalised imports and those keen to restrict them. If Art. 115 were not applicable then regional protection would have a

<sup>20</sup> See White Paper on Completion of the Internal Market, 1985, COM (85) 310 def 11-12.

<sup>21</sup> O. J. 1987, L 238/26.

<sup>22</sup> Ibid., Para. 11 of the Preamble.

<sup>23</sup> Ibid., Art. 3 (3), (f).

<sup>24</sup> G. Yannopoulos: The European Community's External Policy, in: Journal of World Trade Law, 1985, p. 451.

<sup>25</sup> P. Vogelenzang: Two Aspects of Article 115 EEC Treaty: its use to buttress community-set sub-quotas, and the Commission's monitoring system, in: Common Market Law Review, 1981, p. 174.

<sup>26</sup> Opinion of the European Court of Justice, 11 November 1975, (1975) ECR 1355; cf. also C. W. A. Timmermans: 1987, op. cit., pp. 164-165; C. W. A. Timmermans: La libre circulation des marchandises et la politique commerciale commune, in: Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels, Bruges, Story, 1988, pp. 102-103; but cf. also P. Vogelenzang, op. cit., p. 180.

very limited effect. This would be the case if perishable goods were concerned or if transport costs were too high making indirect importation unattractive. Nevertheless, for the Community to give special treatment to certain member states is contrary to the desired uniform Community approach required under Art. 113 of the Treaty. However, regional protection can sometimes be accepted but only in exceptional circumstances, i.e. where the relevant market of a certain product is limited to one or more states. Whether this kind of protection is needed can only be determined after an assessment of the Community situation as a whole and even then Art. 115 must be ruled out where attempts are made at sidestepping it.<sup>27</sup> If necessary the Community must take measures at its external borders, in other words introduce Community-wide protection. If, for example, a member state's market is flooded by imports it cannot absorb, then the surpluses should be spread out amongst the other member states. If that remains inadequate protection then the Community quota should be reduced.

### Subquotas

Subquotas may also not be founded on an assessment of the different national markets and their ability to absorb certain levels of imports. This would imply that protection is granted to each market individually creating different conditions of importation and giving rise to trade deflection. To bundle together national measures and to give them a Community label without drawing the logical conclusions that a transfer of competence to the Community entails can only be damaging to the internal market. Art. 113 EEC Treaty requires a uniform approach. If adjustments are to be made then they can only be effected at Community level. Subquotas can only be accepted when introduced for administrative reasons, thus enabling a better distribution of goods in the absence of Community customs authorities. In this latter case trade deflection can no longer be a preoccupation due to the absence of national protective measures.

Having taken these circumstances into consideration (regional protection and subquotas), it has to be said that commercial policy measures taken by individual

member states implementing a non-uniform Community measure cannot be regarded as having been taken "in accordance with the Treaty" as required by Art. 115 itself. The underlying commercial policy measure being incompatible with Art. 113 denies the national measure all legal effect for the purposes of Art. 115.

Notwithstanding the above-mentioned assertions the Commission has allowed Art. 115 to be applied in cases where regional protection has been granted by the Community<sup>28</sup> with regard to products already liberalised at Community level, although this has not yet occurred as far as Eastern European goods are concerned. This has also to a larger extent been the case where regional protection was granted with regard to textiles pursuant to Regulation 4136/86 and prolifically where subquotas derived from a global Community quota have been divided up among member states on a non-uniform basis, a trend which the European Court of Justice has also recently sanctioned.<sup>29</sup>

### Bilateral Trade Agreements

After 1975, despite the non-recognition of the Community's exclusive powers in the commercial policy area, some Eastern European countries concluded a number of sectoral agreements with the EEC. Romania concluded a textile agreement in 1976, followed in quick succession by Hungary, Poland and Bulgaria.<sup>30</sup> In the agricultural and iron and steel sectors agreements have also been concluded.<sup>31</sup> In 1980 Romania even went as far as signing a general trade agreement with the Community. This non-preferential agreement introduced wider import possibilities for a limited amount of Romanian industrial goods by eliminating quantitative restrictions or installing broader import quotas (Art. 5).<sup>32</sup> Besides these concessions however the autonomous general import regimes remained applicable allowing for the amendment of quotas. Nevertheless this precedent is significant and with negotiations in progress between the EEC and some individual CMEA member countries (Hungary, Czechoslovakia, Romania) it is becoming clear that economic interests

<sup>27</sup> C. W. A. Timmermans, 1987, *op. cit.*, pp. 168-169 and 176.

<sup>28</sup> This was the case when regional protection was granted to France to protect her markets against an increased amount of imports of beach slippers from China under Regulation 1766/82 and of textiles from Turkey after the safeguard clause contained in the preferential agreement was applied; cf. O. J. 1982, L 168/29 and O.J. 1982, L 243/20 where intra-Community surveillance measures were authorised.

<sup>29</sup> European Court of Justice, 5 March 1986, *Tezi versus Commission and versus Minister of Economic Affairs of the Netherlands*, (1986) ECR 887 and 933.

<sup>30</sup> D. Oldenkop: EEC-Comecon Relations, Asser Institute, Coll. on European Law 1979, p. 15. These agreements were concluded between 1976-79 after the conclusion of the Multifibre Arrangement in 1973.

<sup>31</sup> For agricultural agreements see for Poland and Romania O. J. 1981, L 137, for Czechoslovakia O. J. 1982, L 204 for Hungary O. J. 1981, L 150 and for Bulgaria O. J. 1982, L 43. For iron and steel agreements see reference by J. Maslen, *op. cit.*, p. 331.

<sup>32</sup> O. J. 1980, L 352/6 implemented by Regulation 3419/83, O. J. 1983, L 346/1.

override ideological entrenchment: the wind of change blowing over the Kremlin since Gorbachev came to power has encouraged individual CMEA countries to step up their negotiations with the Community and even led to the signing of the long-awaited Joint Declaration between the European Community and the CMEA on 25 June 1988.<sup>33</sup>

As yet in general there have not been any applications of Art. 115 with regard to products liberalised under trade agreements except where regional protection has been introduced via a safeguard clause. For the agreement with Romania on trade in industrial products the latter has not occurred but is potentially possible in view of the European Court of Justice's recent stance on the issue (see below). On the other hand, the fact that the Community itself has concluded agreements covering textile products with certain Eastern European countries has not constituted a sufficient enough reason to stop applying Art. 115. Although this is to be criticised on legal grounds the European Court of Justice's approval of this approach does highlight the difficulties for the member states in accepting a fully completed common commercial policy. The conclusion of new comprehensive bilateral trade agreements by the Community with Eastern European countries allowing the liberalisation of imports should in effect eliminate the application of Art. 115. To ensure this, however, the necessary safeguard clauses to be included in the agreements should be administered exclusively by the Community and require the assessment of the necessity of protecting the Community industry as a whole. How much progress will be made towards reaching agreement with the individual CMEA member countries and how far-reaching the outcome will be remains to be seen. Where quantitative restrictions still exist bilateral agreements will be helpful. In the case of Hungary and Romania, for instance, bilateral agreements should help settle differences surrounding the implementation by the Community of provisions laid down in the two Eastern European countries' Protocols of Accession to the GATT. As already mentioned in the case of Romania, although the abolition of quantitative restrictions was provided for, no target date for their eventual elimination was set. If, on the other hand, the agreements only contain a widening of quotas (as is the

case for the agreement with Romania) Art. 115 will remain potentially applicable until such moment as the national restrictions are abolished.

### Decisiveness of Uniform System

The question of the application of Art. 115 where a Community agreement is already in place has not been a direct issue before the European Court of Justice, although in the Cayrol case<sup>34</sup> in 1977 the question was raised. A trade agreement with Spain allowed member states to impose national quotas on table grapes during certain parts of the year so that a common commercial policy for grapes only prevailed the rest of the time. The Commission stated then that "a Community system provided for by a commercial agreement does not necessarily entail the existence of a uniform system applicable to trade with third countries... the decisive factor in including the application of Art. 115 of the Treaty is not the existence of a Community agreement but the content of that agreement and, in the last analysis, the existence of a uniform system."

It is clear that the Commission was – and still is – prepared to examine whether quotas were imposed by the Community to protect individual markets so as to justify the use of Art. 115. In the Tezi cases of 1986 the Court, in the very sensitive area of textiles – where the application of Art. 115 is prolific – decided that Regulation 3859/82 implementing Community textile agreements, dividing a Community quota into subquotas, left room for the application of Art. 115 despite providing a safeguard mechanism itself to deal with difficulties caused by direct imports (Art. 5 and 7).<sup>35</sup> The Commission's arguments in those cases were not based on whether the Community had taken commercial policy measures but on whether a uniform system was in place. This it regarded not to be so in the case of Community subquotas divided up amongst the member states, regional protection, and authorisation obtained by member states to maintain quantitative restrictions initially adopted at national level.<sup>36</sup> The Court followed this argument basing its decision on the fact that no uniform conditions for importation existed despite there being a Community regime. Although the Court did not directly tackle the issue of regional protection its stance towards subquotas clearly implies that with regard to the evasion of measures taken by the Community aimed at protecting one or more member states Art. 115 can be used. The Court did on the other hand seem to accept the inability to apply Art. 115 if subquotas were introduced for purely administrative reasons.<sup>37</sup>

<sup>33</sup> O. J. 1988, L 157/34 and 35.

<sup>34</sup> European Court of Justice, 30 November 1977, Cayrol versus Rivoira (1977) ECR 2271.

<sup>35</sup> See footnotes 14 and 29.

<sup>36</sup> (1986) ECR 896.

<sup>37</sup> (1986) ECR 925.



Because the framework for remedial action at Community level is present and the regime introduced by the regulation cannot be considered as containing national commercial policy measures which have been given authorisation by the Community (seeing as no similar national measures existed prior to the expiry of the transitional period) the Tezi decision must come in for criticism. However, this decision clearly shows that the member states are not ready to unconditionally relinquish Art. 115 as an effective protectionist measure. The Court obviously felt that the political climate was unprepared for too radical a policy-making ruling.

### Conclusion

To summarise, the present situation with regard to Community agreements is as follows:

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- ☐ If an agreement liberalises imports Art. 115 cannot be applied. This is also the case if a Community quota is agreed upon without subdivision or if subdivision is introduced for purely administrative reasons.
- ☐ Agreements which lead to the introduction of subquotas taking into consideration the situation on the different national markets or which allow liberalisation of imports but include the possibility of regional protection, do not preclude the application of Art. 115.
- ☐ Agreements with third countries offering self-restraint in respect of their exports to certain member states can also create disparities in the import conditions of the member states which could lead to deflections of trade. At present Art. 115 is still available to provide a solution in these instances.<sup>38</sup>

When negotiating on bilateral agreements with Eastern European countries, it would be strongly advised that where safeguard measures are introduced in the form of quantitative restrictions or import licensing requirements, the necessary protection be justified by a general assessment of the situation in the Community as a whole and applied on a Community-wide basis. This approach can be assisted greatly by close cooperation between the national authorities of the member states when monitoring quotas. In that way the

advantages of an internal market can be preserved. However, the current case-law of the European Court of Justice admits that an in-between approach is acceptable, i.e. an incomplete common commercial policy. If regional protection were included as a protective measure then Art. 115 would still be allowed: the pressure by the member states on the Community to include regional protection will therefore be great.

Art. 115 is a protectionist measure shielding industries which run the risk of serious damage being caused by cheap imports from outside the Community including Eastern European countries. The maintenance and restructuring of these industries can be achieved by other means than Art. 115 which in essence inhibits market integration. For example, an industrial policy at Community level has to be construed whereby the available Community funds can play an important role. Also, prudent application of the competition rules and in particular Art. 85 (3) EEC Treaty would considerably improve some industries' chances of survival, as would a more lenient view of certain forms of aid provided either by the Community or the individual member states.

At the moment no uniform common commercial policy vis-à-vis Eastern European countries is in place. Instead a plethora of uncoordinated provisions exists without, however, leading to a complete transfer of competence for trade relations to the Community institutions. Art. 115 still provides some member states with the incentive not to give up their existing competence with regard to Eastern European goods and comfortably protects their national industries while at the same time undermining basic principles of Community law. Especially where regional protection is granted a continued application of Art. 115 will compound difficulties in making progress.

By concluding bilateral agreements excluding the furtherance of national quotas the elimination of the previous autonomous regime will be effected, streamlining commercial policy towards the Eastern European countries concerned. Also, dialogue before protection can be facilitated, providing transparency in Community policy and enhancing mutual confidence, ensuring that a definite step towards economic stability in Europe will be made.

It cannot be denied that political relations and trade relations remain closely linked. The European Community can stimulate the former if it can establish healthy trade links with Eastern Europe. Curbing the application of Art. 115 will end the discriminatory treatment of Eastern European goods and certainly play a part in improving relations at both levels.

<sup>38</sup> Art. 115 was applied in 1983 to stoneware which had been imported into France from South Korea. Initially, regional protection had been granted under Regulation 288/82. However, this protection was withdrawn after negotiations with South Korea resulted in an undertaking on her part to restrict her exports to France and the UK. Subsequently, to bolster these restrictions France obtained authorisation to introduce surveillance measures under Art. 115; O. J. 1983, L 247/8.