ARTICLE

Users in EU Trade Defence Investigations: How to Better Take their Interests into Account, and the New Role of Member States as User Champions after Comitology

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In EU anti-dumping and anti-subsidy investigations, the European Commission may decide not to impose measures even in the face of injurious dumping or subsidization, on the ground that this would be against the interests of the European Union. This article is an attempt at reviewing and summarizing the rules and discipline governing the use of the union interest, and at presenting the practice of the European Commission. It also critically reviews this practice, and suggests ways of improving the level of cooperation by users and the taking into account of their interests. The role of Member States in relaying and defending the interests of their industry, under the comitology procedure applicable since February 2014, is then discussed.

1 Introduction

Trade defence investigations are usually presented as a tool protecting a domestic industry against the injury caused by cheap foreign imports. This definition is probably correct for trade defence investigations targeting finished goods or consumer products. However, for intermediary products manufactured by one industry and consumed by another, a trade defence investigation can also be a procedure pitching two domestic industries against each other: the complaining industry and its customers in one or more downstream industries.

In the European Union (EU), the interests of these downstream industries are taken into account in a public interest analysis, called Union (or Community) interest.

There are a lot of speculations about the European Commission's seemingly inconsistent practice, and a lot of misconceptions about what the Union interest is, or should be.

In this article, I attempt to summarize the Commission's practice concerning Union interest, looking at the law (Article 21 of the basic Anti-Dumping Regulation – ADR – and Article 31 of the basic Anti-Subsidy Regulation – ASR) and case law, published trade defence Regulations and Decisions, draft Guidelines issued by the Commission in 2013, a clarification document that the Commission communicated to Member States in 2006, and the author's experience (Title 2).

From this analysis, I conclude that the Union interest test is above everything else a tool for the Commission to take into account the interests of users – downstream industries that would be adversely affected by the imposition of measures. The Commission's primary (and genuine) concern is not to destroy more jobs than it is protecting through the imposition of measures.

In its Union interest analysis, the Commission is balancing the interests of the EU complaining industry against the interests of users, to ensure that the duties imposed are not disproportionately hurting users relative to the benefits they would confer on the complaining industry.

The Union interest test, far from being opaque or mysterious is actually quite clear. Users have to demonstrate that they depend on imports of the product concerned, and that no alternative sources of supply exist in the EU or in countries not affected by the measures; that the share of the product concerned into their cost of production is high; that their profitability is low and

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prices cannot be increased; in other words that imposition of the proposed duties would cause them to stop producing in the EU and would destroy EU jobs.

In its assessment the Commission needs to balance how serious the situation of users needs to be before it either terminates an investigation or alter the form of measures against the expected benefits that duties would confer on the complaining industry. Decisions to terminate the investigation without imposing measures, or modify the form of measures under Article 21 ADR or Article 31 ASR do happen, although not very often.

What is a lot more frequent, and also a lot less transparent, is for the Commission to alter its dumping, subsidization or injury margin calculations in order to reach a duty level that is considered appropriate in view of the various interests at stake. Calculations made in trade defence investigations involve a very significant amount of discretion on the part of the Commission, and discretionary decisions often have a major impact on the level of the duty. The Commission remains aware at all times of the conflicting interests present in the investigation, and uses its discretion at various stages of the calculations to arrive at a duty closer to what it considers appropriate.

But in order to convince the Commission that the imposition of duties will be harmful to them, it is necessary for downstream user industries to cooperate with the Commission (Title 3). Although cooperating in trade defence investigation is essential, in too many investigations users do not, or do it only in an incomplete or passive manner. This is a mistake since the Commission's current practice is not to proactively seek information from users, and to consider that a lack of cooperation indicates an absence of impact of the measures on users. Instead, the Commission focuses on obtaining information from the Union industry, which it needs to reach its findings of injury, and to a lesser extent from exporting producers, which it needs to calculate dumping.

With regard to the imbalance between the position of complainants and of users in trade defence investigations, I believe the Commission should proactively try to get information from users and their associations, for instance by actively seeking the assistance of Member States, and by designating teams to investigate Union interest that are separate from those investigating injury. The Commission should also schedule investigations of user questionnaire responses early in the investigation so as to have data on Union interest when formalising its proposal for provisional measures.

In addition, the role of EU Member States as concerns the interests of users industries should not be underestimated (Title 4), despite the changes introduced by the comitology reform implemented in February 2014. The Commission consults Member States, and simple majorities still have a very significant impact on the progress and outcome of investigations, as they did in the past. Furthermore, the appeal procedure that the new regime creates introduces a whole new negotiation procedure that could offer opportunities for Member States to articulate their objections, possibly with a view to prepare a legal challenge or support the challenges lodged by others. Indeed, it should be easier today for Member States to challenge definitive trade defence measures, as these are adopted by the Commission and no longer by the Council of the EU of which they are part.

2 The Union Interest in Trade Defence Investigations

2.1 *Law and Case Law*

2.1.1 *The WTO*

The Antidumping Agreement (ADA)[1] and the Agreement on Subsidies and Countervailing Measures (ASCM)[2] of the World Trade Organization (WTO) restrict the freedom of WTO members to impose anti-dumping and anti-subsidy measures. They require WTO members to impose anti-dumping and anti-subsidy measures only after injurious dumping or injurious subsidization has been found, following the procedures and disciplines they set out.

But the imposition of measures is optional,[3] and WTO Members may well decide not to impose anti-dumping measures even in the presence of injurious dumping. It is therefore possible for WTO members to provide that no measure is to be imposed in the presence of injurious dumping or subsidization, for instance on grounds of public interest.

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[1] Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) (Adopted 1994), 1868 U.N.T.S. 201.

[2] Adopted 1994, 1869 U.N.T.S. 14.

[3] ADA Art. 9.1: '*The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.*' ASCM Art. 19.2 and its footnote 50 are more explicit, and add that '*procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties. FN50: For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.*'

2.1.2 *From Community Interest to Union Interest*

In the European Union (EU), the first anti-dumping and anti-subsidy Regulations already provided that anti-dumping and countervailing duties should be imposed only in cases where '*the interest of the Community calls for Community intervention.*'[4] The concept of Community interest was further defined and became the subject of a specific provision for the first time in 1994.[5]

The provisions existing today are the ones introduced in 1994, which became Article 21 of the current basic anti-dumping Regulation[6] and Article 31 of the basic anti-subsidy Regulation,[7] adopted in 1995 and 1997, and both codified in 2009.[8]

Community interest has in the meantime been renamed 'Union interest'. Although still formally present in the current wording of the EU's basic anti-dumping and anti-subsidy Regulations, the term 'Community' became obsolete when the Treaty of Lisbon entered into force on 1 December 2009 removing the term from the EU Treaties. In all documents adopted by the EU institutions since that date, the term 'Community' has been replaced by 'Union'.

2.1.3 *Article 21 of the Basic Anti-Dumping Regulation and Article 31 of the Basic Anti-Subsidy Regulation*

The Union interest test is contained in Article 21 of the basic anti-dumping Regulation (ADR) and Article 31 of the basic anti-subsidy Regulation (ASR).[9] Both provisions are identical, except of course that they refer to dumping or subsidization, respectively. Article 21 (1) ADR and 31 (1) ASR provide that even if the Commission finds injurious dumping, it nevertheless has to make a *'determination as to whether the Community interest calls for intervention (…) based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers.'* As a consequence of this analysis, *'Measures, as determined on the basis of the dumping{/ subsidisation} and 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.'*

Article 21(2) ADR and Article 31 (2) ASR specify that this determination is to be based on the views and information submitted by '*complainants, importers and their representative associations, representative users and representative consumer organisations*', but not exporting producers, within the time-limits set in the notice initiating the investigation. All parties (including exporting producers) must be given the opportunity to comment on such views and information. Although Article 21(7) ADR and 31(7) ASR insist on the fact that '*Information shall only be taken into account where it is supported by actual evidence which substantiates its validity*', the EU Courts have clarified that the Commission may also take into consideration 'views', even if they are unsubstantiated.[10]

The Union interest analysis has to be made before provisional (Article 7 ADR, Article 12 ASR) and definitive (Article 9 ADR, Article 15 ASR) measures are imposed. It applies in new proceedings (initiated under Article 5 ADR and Article 10 ASR), as well as in all forms of review investigations (initiated under Article 11 ADR, Articles 18 to 20 ASR).[11]

The Union interest analysis is prospective, and the Commission therefore does not have to limit its assessment to facts and information relating to the period of

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4 Article 15, 17 of Regulation (EEC) No 459/68 of the Council of 5 Apr. 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, OJ [1968] L93/1. Identical or similar language was found in the later basic Regulations: Council Regulation (EEC) No 3017/79 of 20 Dec. 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ [1979] L 339/1; Council Regulation (EEC) No 2176/84 of 23 Jul. 1984 on protection against clumped or subsidized imports from countries not members of the European Economic Community, OJ [1984] L 201/1; Council Regulation (EEC) No 2423/88 of 11 Jul. 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ [1988] L 209.

5 Council Regulation (EC) No 3283/94 of 22 Dec. 1994 on protection against dumped imports from countries not members of the European Community, OJ L 349/1; and Council Regulation (EC) No 3284/94 of 22 Dec. 1994 on protection against subsidized imports from countries not members of the European Community, OJ [1994] L 349/22.

6 Council Regulation (EC) No 384/96 of 22 Dec. 1995 on protection against dumped imports from countries not members of the European Community, OJ [1996] L 056/1; codified by Council Regulation (EC) No 1225/2009 of 30 Nov. 2009 on protection against dumped imports from countries not members of the European Community, OJ [2009] L 343/51. Hereafter the 'basic anti-dumping Regulation' or the 'ADR.'

7 Council Regulation (EC) No 2026/97 of 6 Oct. 1997 on protection against subsidized imports from countries not members of the European Community, OJ [1997] L 288/1; codified by Council Regulation (EC) No 597/2009 of 11 Jun. 2009 on protection against subsidized imports from countries not members of the European Community, OJ [2009] L 188/93, hereafter the 'basic anti-subsidy Regulation' or the 'ASR.'

8 Codification is the process of bringing together a legislative act and all its amendments in a single new act. The new act passes through the full legislative process and replaces the acts being codified.

9 The text of Art. 21 ADR is copied in full at the end of this Article.

10 Case T-132/01 *Euroalliages and Others v Commission,* [2003] E.C.R. II-232, at para. 10: *'That provision therefore allows the institutions not only to take into consideration "information" but also "views". Article 21(7) of the basic regulation cannot therefore be interpreted as meaning that the Commission should not take the users' views into consideration nor that in order for those views to be taken into account there must be evidence to corroborate them.*'

11 Although Art. 11 ADR and Art. 18–20 ASR make no reference to the Union interest test, the EU's Courts have held that *'(…) the Community interest requirement, (…), must also be taken into consideration during a review when deciding whether to retain measures that are due to expire*'. See Case T-432/12 *VTZ v. Council of Europe* [2015], at paras 137 and 142 – See also Case T-459/07 *Hangzhou Duralamp Electronics Co., Ltd v Council* [2013], at para. 173 and Case T-132/01 *Euroalliages and Others v Commission* [2003] E.C.R. II-2329), at paras 41–42, 56–58.

investigation, but may take into account events that took place afterwards.[12]

2.1.4 *The Commission Enjoys Significant Discretion when Deciding on Union Interest*

As with all other assessments in trade defence investigations, the European Commission enjoys broad discretion when assessing the facts of a case and weighing the various interests at stake in order to reach a conclusion as to whether anti-dumping and anti-subsidy measures should, or should not be imposed on grounds of Union interest. In *Hangzhou Duralamp Electronics*, for instance, the General Court ruled that '*according to settled case-law, the institutions enjoy a wide discretion in the sphere of measures to protect trade, {…}. That case law also applies to the determination of the issue of whether it is in the Community interest to impose anti-dumping measures, to which Article 21 of the basic regulation relates, and the balancing of the various interests concerned, since they necessarily involve complex economic assessments.*'[13]

The significant discretion enjoyed by the Commission when assessing Union interest knows only two limits:

– If the Commission did not comply with procedural rules, or facts on which the Commission's choice were made were not accurately stated, or there are manifest errors of appraisal of the facts or a misuse of power, the Regulations imposing the measures can be successfully challenged before the Courts of the EU.

– A qualified majority of Member States is actively opposing the Commission's proposed measures, which will force the Commission to withdraw its draft implementing Regulation under the rules of comitology (see Title IV below).

2.2 *The Practice of the European Commission*

On 10 March 2013, the Commission issued a communication to the Council of the EU and the European Parliament (the EU's co-legislators) on the Modernization of Trade Defence Instruments[14] which included proposed legislative changes to the basic anti-dumping Regulation, as well as four draft guidelines codifying the Commission's practice. One of the guidelines is on Union Interest.[15] Although the Commission's proposal has not been adopted (yet) by the co-legislators, the Guidelines are described in the Communication as '*spring{ing} from the Commission's experience.*'[16] What is written there is therefore useful to understand how the Commission applies the Union interest test in practice.

The draft guidelines echo the content of a much more detailed note that the Commission had addressed to the Member States in 2006.[17] Both documents read together with the Commission's practice summarized below provide an interesting insight into how the Commission applies the Union Interest test.

In the author's experience, the practice of the Commission can be summarized as follows.

2.2.1. *The Imposition of Measures is the Rule, and Termination on Grounds of Union Interest is an Exception*

Article 21(1) of the basic Regulation stresses that '*the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration*.'The Commission often recalls in this regard that the primary purpose of the anti-dumping instrument is to counter unfair trade practices, and that duties are not meant to close off the EU market but to restore fair prices.[18]

This, at least, is the stance that the Commission will take by default in the absence of evidence submitted by other parties, and primarily users, showing that the duties will cause them significant harm. Indeed, in the absence of evidence to the contrary, the Commission will always

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[12] Case T-192/08, *Transnational Company 'Kazchrome' and ENRC Marketing v Council* [2011], at para. 224: '*since the analysis provided for in Article 21 of the basic Regulation is forward-looking, the institutions may find it necessary to take into account information which does not relate to the investigation period, but post-dates period.*'

[13] Case T-459/07, *Hangzhou Duralamp Electronics*, at para. 181. See also Case T-1/07 *Apache footwear v Council* [2009], at para. 111: '*Article 21 of the basic regulation grants the institutions a discretion as to the methods for analysing and weighting the various interests represented by concerned parties who have submitted comments in that regard.*'

[14] Communication of 10 Apr. 2013 from the Commission to the Council and the European Parliament on Modernization of Trade Defence Instruments Adapting trade defence instruments to the current needs of the European economy, COM(2013) 191 final, available at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150837.pdf.

[15] A copy of these guidelines is provided at the end of this article.

[16] See under 2.1.4. of Communication COM (2013) 191 final, *supra*.

[17] Commission clarification paper communicated to the EU Member States on 13 Jan. 2006 (TRADE.B.1/AS D(2005) D/568) 'The Community Interest test in anti-dumping and anti-subsidy proceedings', at page 3. Not published. A copy is provided at the end of this article.

[18] See for instance Council Regulation (EC) No 930/2003 of 26 May 2003 terminating the anti-dumping and anti-subsidy proceedings concerning imports of *farmed Atlantic salmon* originating in Norway and the anti-dumping proceeding concerning imports of farmed Atlantic salmon originating in Chile and the Faeroe Islands, OJ [2003] L 133/1, at recital 243; or Council Regulation (EC) No 1371/2005 of 19 Aug. 2005 imposing a definitive anti-dumping duty on imports of *grain oriented flat-rolled products of silicon-electrical steel* originating in the United States of America and Russia and repealing Regulation (EC) No 151/2003 imposing a definitive anti-dumping duty on imports of certain grain oriented electrical sheets originating in Russia, OJ [2005] L 223/1, at recital 163: '*it should firstly be recalled that the objective of anti-dumping duties is not to close off the Community market from any imports, but to restore a situation of fair trade by removing the effect of injurious dumping.*' See also Council Regulation (EC) No 3319/94 of 22 Dec. 1994 imposing a definitive anti-dumping duty on imports of *urea ammonium nitrate solution* originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed, OJ [1994] L 350/20, at recital 31.

consider, in the presence of injurious dumping, that the imposition of the measures is warranted.[19]

But the Commission is genuinely concerned about the impact of its measures on industries and sectors in the EU other than the complaining industry, and will take into account evidence these other industries and sectors submit about the adverse effects that the imposition of measures may have on them.

2.2.2 *Of Paramount Importance are the Interests of the EU Complaining Industry and the Interests of the Downstream Industries*

What is apparent from the draft guidelines and the 2006 clarification paper, and from the Commission's practice, is that although Article 21 ADR and Article 31 ASR list as relevant the interests of importers, traders, upstream industries and consumers, in practice the interests of these groups play hardly any role in the Commission's assessment:

– *Traders of injuriously dumped products*: Traders importing the product concerned are part of the issue that anti-dumping is meant to address: they import the cheap products that are found to be dumped and causing injury to the EU producers; they are co-responsible for the injury caused. It is therefore not surprising that the Commission never considers that a reduction in the turnover of traders caused by the imposition of measures should be a reason not to impose duties, as '*importers in general produce less value added and thus less jobs*' than the Union industry, and the type of people they employ is less likely to be the '*high-qualified jobs requiring special know-how which the Community has an interest to keep*'.[20] In other words, imposing duties will destroy some jobs in the trading sector, but will protect more high-qualified jobs of a type that the EU is trying to protect.

– *Distributors of consumer goods*: The interests of companies that are not just trading, but distributing and marketing consumer goods, is of greater relevance to the Commission. They could be considered to exceed those of the complaining industry if this industry is very small, [21] and the number of jobs that the duties would destroy in the distribution sector would exceed the number of jobs saved or protected by the measures.[22]

– *Upstream suppliers*: EU companies supplying the complaining industry are considered to have interests aligned with those of the EU producers they supply; so that '*(i)n principle, the positive effect of measures for the Community industry will have direct positive consequences for the suppliers, especially if both industries closely work together.*'[23] And the interests of non-EU suppliers are not relevant to the Union interest analysis. The interests of upstream suppliers therefore play no separate role in the Commission's Union interest analysis.

– *Consumers:* Consumers are impacted either through the price increases caused by the duties or by a reduction in consumer choice (if the duties are so high that imports are no longer possible). As such the interests of consumers generally do not play any role in the Union interest assessment, as '"*ultimately the purpose of anti-dumping measures*" [*is to lead to*] "to *some price increase (directly for the imports from the country concerned, indirectly for the Community industry, which may adjust to the higher price level)*".'[24] It is only in cases where the EU production is so small, and the duties high enough to risk preventing imports altogether (at least in the medium term), that the Commission will consider that imposing measures is not in the Union interest, despite the injurious dumping or subsidization found.[25] In such cases, it seems that it is not so much the interests of consumers that are at stake, than those of the people employed in the distribution sector.[26]

Therefore, the Union interest analysis is primarily about reviewing the adverse impact of duties on users[27] of the product concerned in the EU, and whether this adverse

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[19] See Commission Clarification Paper, *supra,* at page 3: '*Once the existence of injurious dumping has been established, there is a presumption for the need to apply measures unless compelling reasons lead to the clear conclusion that these measures would not be in the Community interest.*'

[20] Clarification paper, *supra*, at page 10.

[21] See Council Regulation (EC) N° 1567/97 of 1 Aug. 1997 imposing a definitive anti-dumping duty on imports of *leather handbags* originating in the People's Republic of China and terminating the proceeding concerning imports of *plastic and textile handbags* originating in the People's Republic of China, OJ [1997] L 208/31, and in particular recitals 105–111 concerning why the imposition of duties against synthetic handbags would be against the interests of the Union, despite the injurious dumping found.

[22] See for instance what the Commission writes at page 8 of its Clarification Paper, *supra*, concerning Synthetic Handbags: '*Moreover, the consequences of the non-imposition of measures on employment in the Community synthetic handbags sector were relatively limited (ca. 500 jobs) as compared to the employment in the corresponding distribution sector (ca. 4 100 jobs).*'

[23] Clarification Paper, *supra*, at page 11.

[24] Clarification Paper, *supra*, at page 15.

[25] See Commission Decision of 21 Dec. 1998 terminating the anti-dumping proceeding concerning imports of *certain laser optical reading systems, and the main constituent elements thereof, for use in motor vehicles*, originating in Japan, Korea, Malaysia, the People's Republic of China and Taiwan, OJ [1999] L 18/62. See also the *Leather Handbags* case, *supra*.

[26] See above.

[27] And distributors in exceptional cases.

impact may exceed the benefits duties would confer on the complaining industry, making the imposition of measures disproportionate and consequently against the Union interest.

2.2.3 *If the EU Complaining Industry is Not Viable, or Too Small, the Union Interest Will Immediately Require the Non-Imposition of Duties*

The only circumstances where the Commission considers that the Union interest would always require the non-imposition of measures are if the EU complaining industry is not viable, i.e., it cannot be saved by the duties. In cases where the industry is not viable, the measures would serve no purpose, as *'(m)easures serve a purpose only if the Community industry is viable or has good perspectives to restore its viability and compete on the Community market if measures are imposed.'*[28]

Cases where the investigation is terminated on this ground are extremely rare: the only ones known to the author are the three cases cited by the Commission in its 2006 clarification note. There has been no such case afterwards. Out of these three cases,[29] two concern products where the user industries affected by the measures are large and sophisticated (the car industry, and the steel industry), and in one case (synthetic handbags) the EU industry was found to be smaller than the distribution sector that would be adversely affected by the measures. Therefore, these industries were either very small in absolute term, or small relative to the size of the downstream industries that the duties were adversely affecting. This probably explains why the Commission decided to terminate the measures despite the injurious dumping found.

2.2.4 *Proportionality of the Measures: Does the Harm Caused to Users Exceed the Benefit Derived by the Complaining Industry; Protecting EU Jobs*

In cases where the EU complaining industry is found to be viable (the vast majority of cases), the Commission will weigh the benefits that the anti-dumping measures are expected to bring to the complaining industry, against the adverse consequences that these duties would cause to other EU downstream industries. The Commission is primarily concerned by the impact that measures may have on employment.[30] The Commission will be reluctant to impose measures if by doing so it is destroying more jobs in downstream industries than it is protecting in the complaining industry.

Users in downstream industries invariably object in anti-dumping investigations that the imposition of duties will erode their competitiveness, consequently force them to close or relocate their manufacturing activities outside of the EU, and therefore will destroy EU jobs. Often, these claims are overblown, or unsubstantiated, or both.

In cases where user industries realize sufficiently early in an investigation the importance of cooperating with the Commission, and provide evidence that the risk for employment in the EU is real, the Commission will listen to their concerns. The final measures, if any are imposed, will be what the Commission believes is striking the right balance between the various conflicting interests present in the investigation. How the Commission strikes this balance is decided by one thing primarily: the information received from cooperating users showing the adverse impact that measures would have (see section 3 below). It is also influenced, but here to a lesser extent, by the pressure Member States relaying the concerns of users may place on the Commission (section 4).

Reviewing the Commission's 2006 clarification paper (pages 12 and 13), the 2013 draft guidelines (point 8), and the Commission's past practice, it appears that far from being mysterious or non-transparent, how the Commission perform its analysis of the adverse impact of measures on downstream industries is quite clear.

Users have to demonstrate that:

- They depend on imports of the product concerned from the targeted countries, and that no, or insufficient alternative sources of supply exist in the EU or in countries not affected by the measures.
- The share of the product concerned into the users' total costs of production (cost of raw materials, plus other manufacturing costs, plus selling, general & administrative expenses) is sufficiently high.
- The profitability is low, and there is significant competition from producers of the downstream product located outside of the EU, so that the duties could not be passed on to customers/consumers, or only in insufficient part.
- As a consequence, the imposition of the proposed duties would cause the user industry, or a material share of it, to stop producing in the EU. In other words, it would destroy EU jobs.

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[28] Clarification paper, *supra*, at page 7.

[29] The *Laser Optical Reading System* case, *supra*; The *Leather Handbag* case, *supra*; and Commission Decision of 20 Mar. 1998 terminating the anti-dumping proceeding concerning imports of *tungstic oxide and tungstic acid* originating in the People's Republic of China, OJ [1998] L 87/24.

[30] See Clarification Paper, *supra*, '*particular attention is given to the potential impact of measures, or their absence, on employment*.'

Each of these items has to be duly substantiated, through a response to the Commission's questionnaire intended for users,[31] and additional information demonstrating that the profitability of the company risks being affected to such an extent that it would result in material job losses.

As the Commission is balancing the interests of the complaining industry against those of the user industries, whether the Commission is willing to erode the profitability of users, and to what extent, will depend on how beneficial the measures will be to the complaining industry, and on its size.

It is in this sense that one must understand the Commission's refusal to commit to any profitability threshold under which the interests of users would automatically exceed the interests of the complaining industry.[32]

But experience shows that it is possible for users to obtain the *termination* of measures if they are able to demonstrate the adverse impact on their future activities in the EU that duties would cause:

– In the *White Phosphorus* case[33] (2013), the Commission reached the conclusion that although there was a strong likelihood that production of the product concerned would not resume if duties are not imposed, it was far from certain that production would resume even if measures were to be imposed, as imports of the product concerned after the imposition of the duty would still be cheaper. By contrasts, the Commission found that certain users '*would be severely affected by the measures, and in some cases even their viability might be at stake, as they could not absorb the cost increase and continue to be competitive in the downstream market*.' The Commission therefore concluded: '*On the basis of the above, on balance, it was concluded that the negative impact of measures on the users is more significant than the overall benefit to the Union industry. Therefore, in this case, it is considered that despite the conclusions on injurious dumping, it can be clearly concluded that it is not in the Union interest to adopt anti-dumping measures*.'[34]

– In the *Recordable digital versatile discs* case[35] (2006), the commission analyzed the position held by the Community industry on the market. It was shown that the production of DVD+/-R by the Union started up late as compared to the exporters in the countries concerned, and thus, the Union industry would not be able to increase prices to reach a level of profitability allowing it to survive, or even to increase its sales to lower the costs of production.[36] Therefore, the Commission reached the conclusion that '*On the basis of the above, it can be concluded that the imposition of measures would have substantial negative effects on importers, distributors, retailers and consumers of the product concerned and that the Community industry is unlikely to obtain any significant benefits. It is therefore considered that the imposition of measures would be disproportionate and against the Community interest.*'[37]

– The same conclusion was reached in Commission Decision of 3 November 2006[38] concerning imports of *recordable compact disks*. On that specific market, it was found that the demand in some Member States for CD-Rs was already under pressure by reason of a special tax increasing significantly the retail price for the consumer[39]. As consumers would not be willing to pay more, these costs would have to be borne by the distribution chain. As a result, consumption might decrease[40] and the imposition of the duty would be contrary to the Union interest.

– In an older case, *Tungstic Oxide and Tungstic Acid*[41] (1998), the Commission determined that Union users preferred oxide rather than ammonium paratungstate (APT) to start their production because of environmental requirements. Thus, they were dependent on external sources of supplies.[42] As a consequence, '*the effectiveness of the duty is not guaranteed*

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[31] A model of the user questionnaire is available on DG Trade's website: http://trade.ec.europa.eu/doclib/html/151940.htm.

[32] '*Therefore, a fixed threshold above which any increase in costs would be disproportionate cannot be set*.' Clarification Paper, *supra,* at page 13.

[33] Commission Decision of 13 Feb. 2013 terminating the anti-dumping proceeding concerning imports of *white phosphorus*, also called elemental or yellow phosphorus, originating in the Republic of Kazakhstan. (2013/81/EU), OJ [2013] L 43/38.

[34] *Ibid*. recital 196.

[35] Commission Decision of 20 Oct. 2006 terminating the anti-dumping proceeding concerning imports of *recordable digital versatile discs (DVD+/-R)* originating in the People's Republic of China, Hong Kong and Taiwan (2006/713/EC), OJ [2006] L 293/7.

[36] *Ibid*. recital 31.

[37] *Ibid*. recital 40.

[38] Commission Decision of 3 Nov. 2006 terminating the anti-dumping proceeding concerning imports of *recordable compact discs (CD+/-R)* originating in the People's Republic of China, Hong Kong and Malaysia,-(2006/753/EC), OJ [2006] L 305/15, recital 116.

[39] *Ibid*. recital 109.

[40] *Ibid*. recital 110.

[41] *Supra*.

[42] *Ibid*. recitals 50 and 51.

in the absence of a duty on the upstream intermediary product APT, in particular because of the limited transformation costs between the latter and oxide/acid. In addition, there is a risk that the maintenance of the measures would, to a certain extent, inhibit the access of the user industry to supplies of the product concerned from a major supplier, whereas injury to the Community industry, should measures be repealed, would not appear to be imminent.'[43]

– The same year, in a case concerning *Laser Optical Reading Systems* (1998), the Commission had found that the Union industry had commenced its activity when the product was already well-established on the market. It was difficult assessing the future development of the industry and the possible beneficial effects of the measure. On the contrary, the Commission determined that the imposition of the measures would limit consumers' choices as many exporters would withdraw from the Union should measures be imposed. The Commission consequently concluded that the interests of consumers '*are by far outweighing the interests of the Community industry. In such a situation, it can be considered that the imposition of measures would disproportionately affect importers, traders and consumers of the product concerned*'.[44]

– In *Synthetic Handbags* (1997)[45], the Commission distinguished the two products at stake (leather handbags and synthetic handbags). It concluded that imposing a duty on synthetic handbags would be disproportionate with regard to market shares held by the Community industry (2%) and China (80%). '*In view of the abovementioned facts and trends which differ significantly from those established in respect of leather handbags, it is considered that there are compelling reasons why the imposition of definitive measures on imports of synthetic handbags is not in the interest of the Community. The negative impact of definitive anti-dumping measures on imports of synthetic handbags from the People's Republic of China would be disproportionate to any actual benefit to the Community industry*.'[46]

– A few years earlier, in the *gum rosin* case (1994)[47,] the Commission established 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 favor of the Community industry {…} Should anti-dumping measures be imposed, the Community market would continue to be largely dependent on imports*.'[48] Such measures would therefore not be adequate to remove the injury. Consequently, it is not in the interest of the Union to continue the proceedings.

The Commission has also changed the form of measures from *ad valorem* duties to minimum prices, in circumstances where market prices had significantly increased after the investigation period:

– In *Melamine* (2011) [49], the Commission decided to change the form of the measures from ad valorem duties to minimum import prices (MIP) on the ground that: '*The investigation showed that the share of melamine in {users'} cost of production is between 8 % and 15 %, depending on the activity. The possible impact of measures may therefore be relatively significant depending on the share of melamine in the costs and the level of profitability, which was relatively low*' (recital 61). The Commission concluded at recital 76 that '… *based on the above, it appears to be in the Union interest to change the form of the proposed measures to limit any possible serious impact on the overall users' business which is heavily dependent on melamine supply.*'

– More recently, on 29 October 2015, in *Grain Oriented Electrical Steel (GOES)*, the Commission noted that prices rose during the post-IP period and thus, the imposition of ad valorem duties would go against the Union interest. In view of these post-IP developments, '*the Commission considered it in line with the Union interest to change the form of the measures and not to impose ad valorem duties but instead variable duties*.'[50]

By doing so, the Commission provided a safety net protecting the complaining industry against future prices decreases, while enabling users to import the products free of duty as long as prices remain above the non-injurious minimum thresholds. In both cases, the Commission also decided not to collect the provisional duties, a gesture clearly favouring users.

Finally, Union interest has also been a ground used in expiry reviews for extending duties for periods shorter

Notes

43 *Ibid*. recital 52.

44 *Supra*, at recital 18.

45 *Supra.*

46 *Ibid*. recital 111.

47 Commission Decision of 10 Jan. 1994 terminating the anti-dumping proceeding concerning imports of *gum rosin* originating in the People's Republic of China (94/82/EC), OJ [1994] L 41/50.

48 *Ibid*. recital 35.

49 Council Implementing Regulation (EU) No 457/2011 of 10 May 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of *melamine* originating in the People's Republic of China, OJ [2011] L 124/2.

50 Commission Implementing Regulation (EU) 2015/1953 of 29 Oct. 2015 imposing a definitive anti-dumping duty on imports of *certain grain-oriented flat-rolled products of silicon-electrical steel (GOES)* originating in the People's Republic of China, Japan, the Republic of Korea, the Russian Federation and the United States of America, OJ [2015] L 284/109, at recital 149.

than the normal period of 5-years.[51] On grounds of Union interest, an extension of the measures for only two years was decided in the anti-dumping investigation against *ethanolamines*,[52] and an extension of one year was decided in *integrated electronic compact fluorescent lamps (CFL-i)*.[53]

2.2.5. *The Union Interest beyond Article 21 of the Basic Anti-Dumping Regulation and Article 31 of the Basic Anti-Subsidy Regulation*

The Commission explains that Union interest considerations can result in the termination of the measures, or impact in the choice of measure (form and duration), but '*do not influence the level of duties.*'[54] Strictly speaking, this is accurate, and consequently Regulations and Decisions applying Article 21 ADR and Article 31 ASR are quite rare.

But what is a lot more frequent, and also a lot less transparent, is for the Commission to alter its dumping, subsidization or injury margin calculations in order to reach a duty level that is considered appropriate in view of the various interests at stake. The calculation of dumping and injury margins is generally described as the result of calculations made on data provided by exporting and EU producers, almost as if it were an automatic process.[55] However, trade defence practitioners, within the Commission and outside, know that calculations made in trade defence investigations involve a very significant amount of discretionary powers on the part of the Commission, and that each discretionary decision may have a significant impact on the level of the duty.

The most obvious example is probably the granting or not of market economy treatment (MET), to Chinese and Vietnamese exporting producers primarily, under Article 2(7)(c) of the basic anti-dumping Regulation, to which is attached an almost insurmountable burden of proof[56] that few companies manage to overcome. Another is the use of facts available under Article 18 of the basic anti-dumping Regulation and Article 28 of the basic anti-subsidy Regulation: when should a company be considered not to be doing its utmost to provide the Commission with relevant data, so that, as a consequence, the Commission is required to use (possibly adverse) facts available instead of the company's data?

Granting or rejecting MET, and considering that a company is or is not cooperating to the best of its abilities, both have a huge impact on the level of the duty, and are discretionary powers of the Commission.

Other examples abound: what is the 'reasonable profit' margin to be deducted when constructing the export price under Article 2(9) of the basic anti-dumping Regulation?[57] Should an exporting producer not in the sample be examined individually under Article 17(3) of the basic anti-dumping Regulation? What should be the analogue country for calculating the normal value for exporting producers in non-market economy such as China or Vietnam under Article 2(7)(b) of the basic anti-dumping Regulation (in cases targeting several countries including China/Vietnam, any other investigated market economy country could be the analogue country (including the EU))?[58] What type of adjustments should be made to out-of-country benchmarks used to calculate the market value of Chinese land use rights in anti-subsidy investigations under Article 6 (d) of the basic anti-subsidy

Notes

[51] Article 11(2) of the basic anti-dumping Regulation and Art. 18(1) of the basic anti-subsidy Regulation.

[52] Council Regulation (EC) No 1583/2006 of 23 Oct. 2006 imposing a definitive anti-dumping duty on imports of ethanolamines originating in the United States of America, OJ [2006] L 294/2, at recitals 114–116.

[53] Council Regulation (EC) No 1205/2007 of 15 Oct. 2007 imposing anti-dumping duties on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China following an expiry review pursuant to Art. 11(2) of Council Regulation (EC) No 384/96 and extending to imports of the same product consigned from the Socialist Republic of Vietnam, the Islamic Republic of Pakistan and the Republic of the Philippines, OJ [2007] L 272/1, at recital 116.

[54] Draft Guidelines, *supra* at point 16.

[55] See Clarification Paper, *supra*. under 2.3 ('*precision and technical nature*').

[56] See Melin, Y., *Market Economy Treatment in EU Anti-dumping Investigations Following the Judgment of the Court of Justice of the EU in Xinanchem*, Global Trade & Cust. J. (November 2012).

[57] Should it be 2% as in Salmon from Norway ('*reasonable for a trader in this business sector*'), or 10% as in certain tubes and pipe fittings ('*a level considered reasonable for the product concerned*'). *Salmon*, *supra*, at recital 36. Council Regulation (EC) No 1592/2000 of 17 Jul. 2000 amending Regulation (EC) No 584/96 with regard to the imposition of anti-dumping measures applicable to *certain tube and pipe fittings, of iron or steel*, originating in the People's Republic of China, Croatia and Thailand, OJ [2000] L 182/1, at recital 15.

[58] In such cases, the normal value data in these other market economies is already available to the Commission, without it being necessary to proceed to any separate or new assessment or investigation. Switching from one analogue country to another is therefore easy. See for instance Commission Regulation (EU) No 478/2010 of 1 Jun. 2010 imposing a provisional anti-dumping duty on imports of *high tenacity yarn of polyesters* originating in the People's Republic of China, OJ [2010] L 135/3:

(58) In the notice of initiation the United States of America (USA) was proposed as an appropriate analogue country for the purpose of establishing normal value in the PRC. The Commission invited all interested parties to comment on this proposal.

(59) A large number of parties objected to this proposal and suggested the use of Taiwan or Korea because they claimed these countries were more appropriate …

(60) The Commission examined the above comments and considered that they were overall valid as far as the choice of an analogue country is concerned.

Regulation?[59] What type of adjustments should be made when comparing the imported products and the products made in the EU for the purpose of calculating the injury margin under Article 9(1) of the basic anti-dumping Regulation and Article 15 (1) of the basic anti-subsidy Regulation? When do products start to be so different that they can no longer be considered to be part of the product concerned?[60]

Depending on how the Commission answers these questions, it may find no, low, or high injurious dumping/subsidization. Anyone outside the investigation, and a lot of people actively involved in the investigation, will remain entirely unaware of how the Commission reached its findings of injurious dumping or subsidization. The Commission, however, remains aware at all times of the conflicting interests present in the investigation, and it would seem is genuinely concerned about not destroying more EU jobs than it is protecting. The Commission could thus decide for instance that while a double digit duty would be too harmful to the users, they probably could live with a single digit duty, and therefore use its significant discretion at various stages of the calculations to arrive at a duty closer to what it considers appropriate. Recognizing this helps one to understand what at first sight appears to be sometimes inconsistent administrative practices.

3 The importance for users to cooperate with the commission

3.1 *The Commission Treats the Absence of Cooperation by Users as an Absence of Interest or Concern on Their Part*

In most investigations, the Commission dismisses the objections raised by users on the ground that users have not provided evidence of the adverse effects they are claiming would result from the imposition of measures. The Commission explains in the 2006 Clarification Paper (page 13), that:

> *The determination of the likely cost increase is often complicated by the lack of full cooperation from the user industry. If no precise information in this respect is provided, conclusions have to be reached on the basis of the facts available, which may not allow a representative, arithmetical quantification of the effects of the measures on the downstream industry. The lack of cooperation from users can indicate that the product concerned represents only a small part of their cost of production and that they would not be significantly affected by anti-dumping measures. In exceptional cases, however, e.g. when SME are involved, low cooperation might also be due to resource considerations. This problem, however, exists also for other aspects of the investigation.*

The Commission adds in its draft Guidelines (paragraph 19) that:

> *Union interest findings thus need a solid factual basis and due process is important to establish the relevant facts. Parties invoking Union interest reasons must submit relevant evidence and other interested parties must have the possibility to review such evidence and to comment on it. In order to ensure due process, the respect of deadlines is necessary.*

In *Seamless pipes and tubes*[61] for instance, the Commission held that the imposition of duties *'would very likely not result in a significant impact in the costs of such users, and thus giving a possible explanation to the lack of cooperation of users in*

Notes

[59] Compare the findings in *coated find paper*:

'(262) … the Commission used the average land price per square meter established in Taiwan corrected for currency depreciation as from the dates of the respective land-use right contracts.'

to the findings in **PSF CVD**:
'(96) … the Commission used the average land price per square meter established in Taiwan corrected for currency depreciation ***and GDP evolution*** *as from the dates of the respective land use right contracts.*' (Emphasis added)

Council Implementing Regulation (EU) No 452/2011 of 6 May 2011 imposing a definitive anti-subsidy duty on imports of **coated fine paper** originating in the People's Republic of China, OJ [2011] L 128/18.
Commission Implementing Decision of 16 December 2014 terminating the anti-subsidy proceeding concerning the imports of **polyester staple fibres** originating in the People's Republic of China, India and Vietnam Compare, OJ [2014] L 360/65.

[60] See for instance, the late change of the product scope in *side-by-side refrigerators* from Korea:

'(13) Since the start of this proceeding, the Commission had defined the scope of the product on the basis of external characteristics, namely the presence of at least two separate swing doors, placed side-by-side …'

'(16) As a consequence, it was deemed appropriate to revise the product scope definition as determined in the provisional Regulation. Therefore, the product concerned is definitively defined as combined refrigerator-freezers with a capacity exceeding 400 litres and with the freezer and refrigerator compartments placed side-by-side, originating in the Republic of Korea, currently classifiable within CN code ex 8418 10 20.'
Council Regulation (EC) No 1289/2006 of 25 August 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain side-by-side refrigerators originating in the Republic of Korea, OJ [2006] L 236/11.

[61] Council Regulation (EC) No 954/2006 of 27 Jun. *2006* imposing definitive anti-dumping duty on imports of certain *seamless pipes and tubes, of iron or steel* originating in Croatia, Romania, Russia and Ukraine, repealing Council Regulations (EC) No 2320/97 and (EC) No 348/2000, terminating the interim and expiry reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, inter alia, in Russia and Romania and terminating the interim reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, inter alia, in Russia and Romania and in Croatia and Ukraine, OJ [2006] L 175/4, at recital 229.

the present proceeding'.[62] It is frequent to read in Commission Regulations imposition trade defence measures wording such as '*given the limited amount of information available*[63]' or '*no concrete evidence was provided that could substantiate this claim.*[64]'

By contrasts, in cases where the Commission took the interests of users into account, user cooperation had been intense.[65]

The Commission will therefore conclude that the absence of information submitted by users within the deadlines set in the notice of initiation[66] will be indicative of a lack of interest or concern on their part.[67]

This approach ignores the fact that, unlike complainants who have spent months, sometimes years drafting a complaint and preparing for an investigation, users, even very large ones, often have little to no experience in anti-dumping investigations. They learn that an investigation has been initiated only after the notice initiating the investigation has been published, and then usually fail to appreciate what the investigation could mean for their business due to a lack of staff experienced in trade defence investigations and lack of resources. Most users oftentimes limit cooperation to the submission of a meagre response to the Commission's questionnaire, when they receive it, and often do nothing more than sending a letter objecting to the initiation of the investigation (possibly copying one or two of their national ministers and member of the European Parliament, to no avail). It is common for users to only become aware of the consequences that an investigation may have on their business after the imposition of provisional duties, by which time the Commission has reached near-definitive findings on most elements of the investigation.

3.2 *Under the Current Rules, Users Must Submit Information Early in the Investigation*

The submission of information early in the investigation is critical for all interested parties. This is because in addition to the deadlines provided for in the basic Regulation (for the imposition of provisional and definitive measures primarily), internal deadlines apply.

Notes

[62] Commission Regulation (EC) No 289/2009 of 7 Apr. *2009* imposing a provisional anti-dumping duty on imports of *certain seamless pipes and tubes of iron or steel originating* in the People's Republic of China, OJ [2009] L 94/48, at recital 159. See also for instance Council Regulation (EC) No 442/2007 of 19 Apr. 2007 imposing a definitive anti-dumping duty on imports of *ammonium nitrate* originating in Ukraine following an expiry review pursuant to Art. 11(2) of Regulation (EC) No 384/96, OJ [2007] L 106/1, at recital 103(ii): '*it also appears that there are no major interests of importers or users which would be put at stake in case measures are imposed, and the relatively low cooperation of importers and users in this case supports this finding.*'

[63] Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of *biodiesel* originating in Argentina and Indonesia, OJ [2013] L 141/22, at recital 166.

[64] Commission Regulation (EU) No 1242/2009 of 16 Dec. 2009 imposing a provisional anti-dumping duty on imports of *certain cargo scanning systems* originating in the People's Republic of China OJ [2009] L 332/60, at recital 106 – See also Case T-192/08 *Transnational Company 'Kazchrome' and ENRC Marketing v Council* [2011], at paras 230–232.

[65] See for instance *Yellow Phosphorus*, *supra*,

> *'(193) It should be noted that the cooperating users providing the necessary information in this proceeding, represented almost the totality of imports from the country concerned and a very high proportion of the consumption of white phosphorus in the free market. They were strongly against the imposition of any antidumping duties because of the impact on their costs which they showed could not or could not fully be reflected in their selling prices and which would therefore lead to a downward trend of their economic and financial situation with possible closures of production.'*

High tenacity yarn, *supra*:

> *'(166) Users of HTY have shown a strong interest in this case. Out of the 68 users contacted, 33 cooperated in the investigation. These cooperating users represented 25 % of the total imports from the PRC. These companies are located throughout the Union and are present in various industrial sectors, such as tyres and automotive applications, ropes and industrial applications.'*

[66] One of the latest notices of initiation (Notice of initiation of an anti-dumping proceeding concerning imports of certain *manganese oxides* originating in Brazil, Georgia, India and Mexico, 'OJ 17.12.2015 C 421/1') is worded as follows in relevant part:

> *5.4. Procedure for the assessment of Union interest*
> *Should the existence of dumping and injury caused thereby be established, a decision will be reached, pursuant to Article 21 of the basic Regulation, as to whether the adoption of anti-dumping measures would not be against the Union interest. The Commission will in particular take into account the competition aspects of the present investigation, and interested parties are invited to make relevant comments on that issue.*
> *Union producers, importers and their representative associations, users and their representative associations, and representative consumer organisations are invited to make themselves known within 15 days of the date of publication of this Notice in the Official Journal of the European Union, unless otherwise specified. In order to participate in the investigation, the representative consumer organisations have to demonstrate, within the same deadline, that there is an objective link between their activities and the product under investigation.*
> *Parties that make themselves known within the above deadline may provide the Commission with information on the Union interest within 37 days of the date of publication of this Notice in the Official Journal of the European Union, unless otherwise specified. This information may be provided either in a free format or by completing a questionnaire prepared by the Commission. In any case, information submitted pursuant to Article 21 will only be taken into account if supported by factual evidence at the time of submission.* (Emphasis added)

[67] The Commission has in the past shown flexibility when receiving comments from users. See for instance the Commission's 22 May 2007 proposal COM (2007) 0272 for a Regulation terminating the anti-dumping proceeding concerning imports of *synthetic staple fibres of polyesters (PSF)* originating in Malaysia and Taiwan and releasing the amounts secured by way of the provisional duties imposed, at recital 6: '*The Commission continued to seek all information it deemed necessary for the purpose of its definitive findings. As far as Community production is concerned, an additional questionnaire aiming at obtaining a more precise figure on individual production of PSF was sent to Community producers which did not provide this information previously and to any potential producer of PSF in the Community. The Commission also sent questionnaires to Community users that had not replied before the imposition of provisional measures. The same questionnaire was also sent to users associations.*' This language did not find its way in the Decision finally adopted by the Commission, which terminated the investigation following the withdrawal of the complaint: Commission Decision of 19 Jun. 2007 terminating the anti-dumping proceeding concerning imports of *synthetic staple fibres of polyesters (PSF)* originating in Malaysia and Taiwan and releasing the amounts secured by way of the provisional duties imposed, OJ [2007] L 160/30. See also Case T-132/01 *Euroalliages*, *supra*, at paras 78–81. The Commission had decided to send questionnaires after the expiry of deadlines and accepted the answers submitted by users. The Court considered that this decision was not contrary to Art. 21(2) of the basic anti-dumping Regulation as it '*does not have the effect of unduly prolonging the procedure*'.

There are first deadlines governing the adoption of proposals within the Commission's Directorate General (DG) for Trade, the DG in charge of carrying out trade defence investigations. Then, DG Trade submits its proposal for consultation with the Commission's other directorates general (through the so-called inter-services consultation). Only then are the Member States consulted through comitology (see title IV below). And it is after this first consultation that the provisional Regulation is adopted, and the Commission's provisional findings are communicated to interested parties for comments.

In order to respect these internal deadlines, the Commission's investigators within DG trade have to finalize their draft provisional findings around six months after the case has been initiated, which is three months before the deadline for imposing provisional duties; and then, the Commission does not often materially modify its findings at definitive stage following the submission of comments on the provisional disclosure, and when it does it is reluctantly.

Information submitted after the internal approval procedure has started is much less likely to be taken into account, as the beginning of the approval process removes a lot of flexibility case handlers may have enjoyed when collecting evidence. Once a proposal has been adopted by DG Trade, obtaining the modification of the Commission's findings becomes more complicated still: a report has been issued by the case handlers, it has been reviewed by the hierarchy in DG Trade, people at various stages of the administration have taken position, taken sides, then the DG takes a decision and defends it first before the other DGs, then before the Member States. A solid argument submitted after this internal arbitrage has taken place requires DG Trade to modify its position, and to explain why. That is never easy.

This applies to all interested parties, but is affecting users a lot more than it is affecting complaining industries. Indeed, as already explained above, when a case is initiated by the Commission, complainants have usually spent many months, sometimes several years talking to the complaint office. They know several months before initiation when the case will be initiated, teams are ready, lawyers have been hired. Many complaining industries are also organized in associations that know well, and are sophisticated users of the trade defence instruments. Complainants always submit information on time.

3.3 *The Commission is Not Actively Seeking Information from Users*

This difficulty is compounded by the fact that the Commission itself is not focussed on gathering information from users in the same way it is focussed on gathering evidence from complainants to arrive at a finding of injury, and from exporting producers in order to arrive at a finding of dumping.[68] This is because the Commission does not 'need' information from users in order to impose duties – as it does from complainants.[69]

For instance, in the recent anti-dumping investigation against Grain Oriented Electrical steel from various countries,[70] information had already been provided by users in their questionnaire responses about expected shortages should duties be imposed. The Commission, however, only started verifying the responses of users around six months after the initiation of the investigation, i.e., *after* DG Trade had already decided to impose provisional duties. The Commission then realized that some of the users' concerns were real and urgent, but this realization came too late. It is after the Commission had adopted and published the provisional Regulation that it collected the evidence which lead it to decide later to amend the form of measures from *ad valorem* provisional duties to definitive minimum import prices.[71]

3.4 *The Commission's Current Practice and Organization Should be Adapted*

In the view of the author, this imbalance between the position of complainants and of users in trade defence investigations should cause the Commission to more actively seek information from users and their associations,[72] for instance by actively seeking the assistance of Member States, and by designating teams to

Notes

[68] Cooperation in trade defence investigations is always voluntary, and absence of cooperation is sanctioned by the use of facts available (Art. 18 ADR, Art. 28 ASR). By raising the awareness of parties and adapting its procedures, the Commission should have the ability to impact the quality and number of responses it receives from users (see recommendations under sub-heading (3.4) below).

[69] And to a lesser extent from exporting producers, although absence of cooperation on their part will invariably lead the Commission to find dumping based on facts available (Art. 18 ADR, Art. 28 ASR).

[70] *GOES* case, *supra*.

[71] It probably helped that for the first time the Member States delivered following the publication of the provisional Regulation a negative opinion under the advisory procedure of Art. 4 of the Comitology Regulation (more on this under Title IV).

[72] The Commission sometimes does actively seek information from users, but to the author's experience, rarely, and certainly not as a matter of course. See for instance *PSF CVD*, *supra*.

(40) … experience from trade defence investigations so far shows that although in certain cases, based on the available information, a large number of users may be contacted, usually only a limited number of them are willing to provide a questionnaire reply. Therefore, the Commission, also in this case, actively sought the cooperation of a maximum number of users.

investigate Union interest that are separate from those investigating injury.[73]

The Commission should also schedule investigations of user questionnaire responses early in the investigation so as to have data on Union interest when formalizing its proposal for provisional measures.

The Commission should also adapt its internal decision making process so that, if data becomes available after DG Trade has adopted its proposal for provisional measures (around six months after initiation and three months before the statutory deadline for imposing provisional duties), the Commission can more easily decide to withdraw its draft provisional Regulation, or even withdraw the provisional Regulation after it has been adopted. This could also expedite its definitive findings.

Findings of injury and dumping are not sufficient for the Commission to conclude that provisional duties should be imposed. The Commission must also find that these provisional duties are in the interest of the Union. As explained above, the Commission cannot conclude six months into the investigation that the absence of sufficient evidence submitted by users means that such evidence does not exist and that users' claims are not warranted. The evidence may not be in the Commission's files because it takes time to collect, to obtain the right internal clearance from company management to have confidential data submitted to the Commission, to hire lawyers, etc. These are practical concerns that users and their counsel face in every investigation.

4 The importance for users to talk to the EU's member states

The last section of this article is dedicated to the role of Member States as representatives of the concerns of users in trade defence investigations.

Following the entering into force of the Lisbon Treaty on 1 December 2009, implementing powers, including in trade defence matters, had to belong to the EU's executive arm, the European Commission.[74] But it took more than four years for the European Commission, the Council and the Parliament to finally agree on how to implement this change in practice in trade matters. The change became effective on 20 February 2014, with the adoption and entering into force of Regulation 37/2014.[75] It moved all measures taken in trade defence investigations into the realm of the Commission's implementing powers.

In all sectors where implementing powers have been entrusted to the European Commission, Member States control the work of the Commission through a specific procedure, called comitology, set out in Regulation (EU) No 182/2011.[76] Since 20 February 2014[77] this is true for trade defence investigations as well.

4.1 *The Role of Member States until 20 February 2014*

Until 20 February 2014, the Commission had been responsible for investigating allegations of injurious dumping and subsidization, but the imposition of the definitive measures was a power in the hands of the Council,[78] composed of the EU's Member States.

In practice, however, the Commission was the only institution fully understanding the facts of a case, and the Council did not have the power to amend the Commission's proposals, just to approve or reject them. Member States were consulted at various stages of an investigation through the Anti-Dumping Committee, or ADC and it was in the ADC that the Member States received the draft proposal for a Council Regulation imposing definitive measures, which in the vast majority of cases was approved. The proposal was not discussed by the Member States in the Council or in other forums, except in cases where a simple majority of the Member States opposed the Commission's proposal, which happened from time to time but not often.

The history of the voting in trade defence investigations is one of constant limitation of the Council's powers.[79] Just before the 2014 change, a Commission proposal for definitive measures was considered approved if not opposed by a simple majority of the EU's Member

Notes

[73] Today, the Commission has 'dumping' teams in charge of investigating exporting producers and their related importers, and 'injury teams' in charge of investigating complainants, unrelated importers and users. There are no teams charged of specifically investigating Union interest and the claims and allegations of users.

[74] Article 291(2) of the Treaty on the Functioning of the European Union, see the consolidated version published in OJ [2012] C 326/17.

[75] Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 Jan. 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures, OJ [2014] L 18/1.

[76] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 Feb. 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ [2011] L 55/13.

[77] As a matter of fact, since 12 Mar. 2014, the date on which the first committee was convened under comitology.

[78] Under the wording of Art. 11(4) of the basic anti-dumping Regulation before its modification:

> *Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting on a proposal submitted by the Commission after consultation of the Advisory Committee. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission. …*

[79] For a good presentation of this history, see Wellhausen, Marc. *The Community Interest Test in Antidumping Proceedings of the European Union*, 16(4) American U. International L. Rev. 1027–1082 (2001).

States.[80] In other words, it took fifteen of the EU's twenty-eight Member States to vote against a Commission proposal to overrule the Commission.

Through the various consultations made in the course of an investigation, the Commission was able in most cases to make proposals it knew would not be opposed by a majority of Member States at definitive stage.

4.2 *Comitology in Trade Defence Investigations*

Under the new system, Member States are informed rather than consulted during an investigation, and the definitive measures are adopted by the Commission not by the Council. However, Member States are still consulted (before the same committee, renamed Trade Defence Committee or TDC) before the adoption of a provisional Regulation by the Commission (under Article 8(5) of the comitology Regulation), exactly as they used to be under the previous system.

Also, at provisional stage Member States have now a new right, which is to deliver, after the publication of the provisional Regulation, an opinion under the advisory procedure of Article 4 of the comitology Regulation. Opinions under the advisory procedure of Article 4 are taken by a simple majority of the Member States, i.e., the same majority as before. If an opinion is delivered, it is not binding but the Commission must take '*the utmost account*' of it.

Needless to say, to see a negative opinion delivered in this way after the publication of the provisional Regulation is an embarrassing event for the Commission, and a sign that the consultation that took place before the publication (under Article 8(5)) may not have been very effective.

In practice, to date the Member States have delivered a negative opinion just once, in the GOES case discussed above. How much of the changes between the provisional Regulation[81] and the definitive Regulation[82] were made due to this negative vote will always remain open to speculations. The negative vote probably had a role, and may have facilitated a decision to significantly alter the form of measures.

At definitive stage, Member States have again the opportunity to deliver an opinion on the Commission's draft implementing Regulation, under the examination procedure of Article 5 of the comitology Regulation. Under the examination procedure, if a qualified majority[83] of Member States deliver a positive opinion, the Commission's draft implementing Regulation is automatically adopted. If a qualified majority of Member States delivers a negative opinion, the Commission must withdraw its draft Regulation but can propose an amended version, or initiate discussions before an appeal committee.

However, even if only a simple majority of Member States oppose a draft Regulation submitted by the Commission, the Commission cannot adopt it but has to enter into consultations with the Member States. After these consultations, the Commission has to issue a report to the Member States, and submit its draft implementing act to the appeal committee.

In the appeal committee, any Member State can suggest amendments and the Commission must inform Member States '*of the manner in which the discussions and suggestions for amendments have been taken into account*' (Article 6 of the comitology Regulation). At the end of this process, the appeal committee may deliver an opinion by a qualified majority and if the opinion is negative the Commission's proposal cannot be adopted. In all other cases, the Commission can adopt its proposal.

The appeal committee has not yet met, as there has not been since 20 February 2014 a simple majority of Member States opposing a draft definitive Regulation submitted by the commission. However, the new appeal procedure is very interesting: it can be triggered by the same simple majority as before, and introduces a type of negotiations (through the submission and discussion of amendments) that is entirely new.

Also, as the definitive Regulation is no longer adopted by the Member States through the Council, but directly by the Commission, one wonders whether a Member State, fighting for users (or complainants) located on its territory, may not someday decide to either challenge a definitive Regulation adopted by the Commission, or at least intervene in support of a challenge lodged by others.[84] This would create an entirely new dynamic in such challenges before the EU Courts.

Notes

[80] Article 11(4) of the basic anti-dumping Regulation, *supra*.

[81] Which imposed high *ad valorem* duties. Commission Implementing Regulation (EU) 2015/763 of 12 May 2015 imposing a *provisional* anti-dumping duty on imports of *certain grain-oriented flat-rolled products of silicon-electrical steel* originating in the People's Republic of China, Japan, the Republic of Korea, the Russian Federation and the United States of America, OJ [2015] L 120/10.

[82] Which turned these *ad valorem* duties into minimum prices below the then current price and did not collect the provisional duties. *GOES* case, *supra*.

[83] Article 16(4) of the Treaty on European Union, OJ [2012] C 326/1:

> *As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council {that is 16 of today's 28 EU Member States}, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.*

[84] Under the previous system, where definitive Regulations were adopted by the Council, it was always delicate for an EU Member State to attack the Council of which is it is a member.

4.3 *Member States Have Retained Fully Their Ability to Speak on Behalf of Their Industry*

In the old system, as in the new one, the Commission was the main institution driving trade defence investigations. Users concerned about the adverse impact of a trade defence investigation on their business had, and still have, the primary objective to convince the Commission about their claims. Only rarely could member states successfully oppose a proposal that the Commission was intent to see adopted. This has not changed.

But Member States could, and still can help bring the arguments and concerns of users to the Commission's attention. Member States can also relay to users contacting them what they can and what they cannot expect to achieve in the investigation, and generally push users to actively cooperate with the Commission.

And, most importantly, Member States can also monitor closely the findings and analyses of the Commission, and place objections of users in front of the Commission in the course of the consultations taking place in the TDC. This can act as warning to the Commission that a flawed legal analysis would be challenged in Court, or be the signal that a majority of Member States will oppose the Commission's proposed measures as they stand. It may not result in the termination of the investigation, but may well cause the Commission to take the objections into account, and amend its measures accordingly.

*
* *

ARTICLE 21 OF BASIC ANTI-DUMPING REGULATION

Community Interest

(1) A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken 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 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.

(2) In order to provide a sound basis on which the authorities can take account of all views and information in the decision as to whether or not the imposition of measures is in the Community interest, the complainants, importers and their representative associations, representative users and representative consumer organizations may, within the time-limits specified in the notice of initiation of the anti-dumping investigation, make themselves known and provide information to the Commission. Such information, or appropriate summaries thereof, shall be made available to the other parties specified in this Article, and they shall be entitled to respond to such information.

(3) The parties which have acted in conformity with paragraph 2 may request a hearing. Such requests shall be granted when they are submitted within the time-limits set in paragraph 2, and when they set out the reasons, in terms of the Community interest, why the parties should be heard.

(4) The parties which have acted in conformity with paragraph 2 may provide comments on the application of any provisional duties. Such comments shall be received within twenty-five days of the date of application of such measures if they are to be taken into account and they, or appropriate summaries thereof, shall be made available to other parties who shall be entitled to respond to such comments.

(5) The Commission shall examine the information which is properly submitted and the extent to which it is representative, and the results of such analysis, together with an opinion on its merits, shall be transmitted to the committee as part of the draft measure submitted pursuant to Article 9 of this Regulation. The views expressed in the committee should be taken into account by the Commission under the conditions provided for in Regulation (EU) No 182/2011.

(6) The parties which have acted in conformity with paragraph 2 may request the facts and considerations on which final decisions are likely to be taken to be made available to them. Such information shall be made available to the extent possible and without prejudice to any subsequent decision taken by the Commission.

(7) Information shall only be taken into account where it is supported by actual evidence which substantiates its validity.

DG TRADE Working Document DRAFT GUIDELINES ON UNION INTEREST

I. INTRODUCTION

1. The EU only imposes ant-dumping ('AD') or anti-subsidy ('As') measures if they are not against the interest of the European Union.

2. Article 21 (1) 3rd sentence of Council Regulation (EU) No 1225/2009 ('Basic AD Regulation') and Article 31 (1) 3rd sentence of Council Regulation (EU) No 597/2009 ('Basic AS Regulations') respectively contain a presumption for the need to apply AD/AS measures unless Union authorities "can clearly conclude that it is not in the Community interest to apply such measures".

3. Based on the Institution's experience, these guidelines explain the operation of the Union interest test.

II. ALL INTERESTS OF EUROPEAN ECONOMIC OPERATORS ARE TAKEN INTO ACCOUNT

4. Under the first sentences of Article 21 (1) and Article 31 (1) of the basic Regulations, "a determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers".

5. The second paragraphs of these provisions add that "the complainants, importers and their representative associations, representative users and representative consumer organisations" may make themselves known and provide information to the Commission. In practice the economic operators located in the EU that would be affected by the outcome of the AD or AS investigation have standing under the Union interest test:
   - The complaining Union industry (individual companies as well as associations representing the complainants of an AD/AS case).
   - Other producers of the like product operating a production plant in the EU, and their associations who constitute part of the Union industry according to Article 4 of the Basic Regulation.
   - Individual traders and importers, including those related to exporters, and associations representing importers and traders.
   - Representative individual users, *i.e.* the downstream industry which uses the product under investigation for further processing, and representative associations of users.
   - Suppliers of inputs for the like product/product concerned, including their associations.
   - Representative consumer organisations[85] provided there is an objective link between the organisation's activities and the product under consideration.

6. The above list comprises different types of parties that are typically affected, but it is not exhaustive. Exporting producers of the product concerned have no standing under the Union Interest test as they are not located in the EU.

III. METHODOLOGY

7. The Union interest analysis is not a cost/benefit examination. It aims at identifying the potential effects of imposing or not the AD/AS measures for different interested parties. The analysis is prospective and is normally based on specific data relating to the investigation period (normally one year prior to the initiation of the investigation). It tries to project how the imposition or non-imposition of measures would impact on the economic operators in question.

8. Therefore, the Commission seeks information on the following questions in order to conduct the Union interest analysis:
   - How would the Union industry benefit from measures? Is it likely to maintain its price level and increase its market share as a consequence of the AD/AS measures? Or can it rather be expected to raise prices and maintain current market shares? Or will there be a combination of these two scenarios? What is the future perspective of the Union industry without injurious dumping/subsidisation? Are there high entry costs into the market so that re-entry of

Notes

[85] According to the Court, individual consumers have no standing (CFI, Case T-256/97, BEUC, [2000] ECR-II 101, paragraph 77.

producers who previously left the market or entry of new producers would be unlikely?

– Are there sources of supply of the product concerned from countries other than the one subject to investigation? Are there substitute products?

– Would measures reduce effective competition on the Union market? Would they create or strengthen an oligopolistic/monopolistic market structure or a dominant position on the market?

– How would measures impact on the business of importers and traders? How would measures impact on their value chains? What is the importance of the product concerned for the business activity of the importers/traders (*i.e.* only a minor part or a major share of their total turnover)? What are their profit margins? Could importers and traders pass on cost increases to their purchasers? Do importers and traders also trade the product from other sources including from Union producers?

– How would taking measures / not taking measures affect the interests of the user industry of the like product/product concerned? Would measures result in a shortage of certain product types? How much would users' cost of production increase as a result of measures? Would measures affect the viability of users? Would measures negatively impact on their competitive position in export markets?

– How would the upstream industry be affected by taking measures or not taking measures? Are they economically dependent on the Union industry? Do they also supply the exporters of the dumped/ subsidised products?

– How would final consumers be affected by taking measures / not taking measures? Would their choice of products be significantly limited? Would they be exposed to significant price increases?

– Is there a direct economic link between the product subject to investigation and other EU policies? Would the imposition or not of measures significantly undermine other established EU policy/ policies in a verifiable way?

9. The analysis aims at making representative findings for different types of economic operators in question for which data is available. Individual companies providing data for the Union interest analysis should collectively represent a significant portion of the group in question. Otherwise, they should demonstrate that findings relating to individual companies are representative for the majority of the group in question.

10. Where data is available, the investigation also seeks to establish a cost ratio between the total production costs of each major downstream product and the cost of the product concerned. It then discusses the cost increase if measures are adopted. This calculation examines questions such as:

– Are the exporters and importers likely to fully pass on the duty to their customers or only a part thereof?

– How is the Union industry likely to react as a result of AD/AS measures, *e.g.* will it rather increase prices or benefit from increased economies of scale?

– Do users have alternative sources of supply, *e.g.* do they source the input product potentially subject to measures only from the country/ies concerned and/or also from sources within the Union or from countries not subject to investigation? Are there exporters of the product concerned that are not engaged in injurious dumping/subsidisation or that have only low margins? To what extent can users switch suppliers?

– What are the profit margins of users? Will they be able to pass on any cost increases to their customers?

Experience has shown that the impact of measures is in most cases limited to the input product obtained from the country concerned. Price increases of the input product from other sources as a result of measures are much less likely.

IV. MEASURES ARE NOT TO BE IMPOSED IF THEY ARE CLEARLY NOT IN THE UNION INTEREST

11. Article 21 (1) 2nd sentence as well as Article 31 (1) 2nd sentence of the Basic Regulations enshrine "the need to eliminate the trade distorting effects of injurious dumping / subsidisation and to restore effective competition shall be given special consideration". Measures may not be applied where the authorities "on the basis of all information submitted, can clearly conclude that it is not in the Community interest to apply such measures" (3rd sentence of the two respective provisions).

12. These two parameters outlined above constitute a rebuttable presumption that AD or CVD measures are normally in the Union interest if injurious dumping or subsidisation has been found.

13. The standard to rebut this presumption is high. Measures would normally be against the Union interest if it can be established that the Union industry would not be able to benefit from such measures, *i.e.* that the industry does not have the potential to recover from injurious dumping/ subsidisation and play a role in the Union market in terms of market share, production capacity,

technology etc. Measures would also be against the Union interest if their adoption entails disproportionate negative consequences for the user industry of the product concerned. Proportionality is also applied in relation to possible negative consequences on importers, traders or consumers.

14. By way of example, measures may be found clearly against the Union interest in light of some or all of the following circumstances: the Union industry's market share is very small, the future perspective of the Union industry is unclear, duties amount to a multiple of the turnover of the Union industry, measures would limit consumer choice and the level of employment provided by the Union industry is low.

15. On the other hand, since the Union interest analysis is not a simple cost/benefit analysis, the imposition of measures is not automatically against the Union interest if such measures have negative consequences for importers, traders, users and / or consumers. Moreover, AD/AS measures are not intended to exclude the dumped or subsidised imports from the EU market, but to ensure that they compete on a non-dumped/subsidised or non- injurious price level (whichever is lower) with other suppliers on the EU market. Therefore, the mere fact that Union producers cannot replace the dumped or subsidised imports does not run *per se* against the Union interest.

V. UNION INTEREST CONSIDERATIONS MAY INFLUENCE THE SELECTION OF THE TYPE OF MEASURES

16. The appreciation of all the various interests taken as a whole under the first sentences of Article 21 (1) and Article 31 (1) of the Basic Regulations may also have an impact on the choice of measure. Considerations relating to the impact of measures may for example play a role in the decision whether an AD/AS duty should be imposed or an undertaking should be accepted. By contrast, Union interest considerations do not influence the level of duties. In other words, the duty rate or the minimum prices set in an undertaking cannot be changed because of Union interest considerations.

VI. RELEVANCE OF THE UNION INTEREST FOR DIFFERENT TYPE OF INVESTIGATIONS

17. Union interest is examined in all investigations initiated pursuant to Article 5 and 10 respectively. Moreover, it is examined in all expiry reviews initiated pursuant to Article 11(2) and 18 respectively[86]. In interim reviews (see Article 11(3) and 19 respectively), Union interest is only examined if the scope of an investigation covers dumping/ subsidies and injury or if such review explicitly covers Union interest. In reviews, the past impact of existing measures is an important source of information.

VII. PROCEDURE FOR ESTABLISHING UNION INTEREST

18. The respective third sentences of Article 21 (1) AD Regulation and Article 31 (1) AS Regulation stipulate that the decision about the non-application of measures has to be taken 'on the basis of all information submitted'. Paragraph 7 adds that "information shall only be taken into account where it is supported by actual evidence which substantiates its validity".

19. Union interest findings thus need a solid factual basis and due process is important to establish the relevant facts. Parties invoking Union interest reasons must submit relevant evidence and other interested parties must have the possibility to review such evidence and to comment on it. In order to ensure due process, the respect of deadlines is necessary. The due process comprises the right to make submissions on Union interest, the right to inspect the submissions made by other parties and to respond to them, the right to request a hearing (provided the party sets out the reasons in terms of Union interest why they should be heard), the right to provide comments on the application of provisional duties, and the right to request disclosure of the facts and considerations on which final decisions are likely to be taken. If parties provide confidential information or data, they are also required to provide a non-confidential summary.

20. The Commission also seeks information and data relevant to the assessment of the Union interest, and

Notes

[86] CFI, Case T-132/01, Euroalliages et al., [2003] ECR II-2359, paras. 40, 56-58.

facilitates the cooperation of parties. In addition to the interested parties that request a questionnaire within the deadlines, the Commission sends out questionnaires to parties it knows or can reasonably get to know via representative associations or other means, and who have standing under the Union interest test. The deadlines to complete questionnaires and provide comments are set out in the notice of initiation of the investigation. Questionnaire responses submitted by parties are typically verified on the spot by the Commission. If the number of interested parties is high, sampling is applied and only interested parties selected in the sample are requested to submit a questionnaire reply and accept an on-the-spot verification by the Commission.

COMMISSION CLARIFICATION PAPER

13.1.2006

The Community Interest Test in Anti-dumping and Anti-subsidy Proceedings

Executive summary

This paper describes the legal basis and practice of the Institutions with regard to the Community interest test. It illustrates the practice with examples from recent practice.

The main purpose of the Community interest test is to decide whether there are particular reasons not to impose measures in a given proceeding, despite a finding that the dumped or subsidised imports caused material injury to the Community industry. Since Community interest considerations can lead to the conclusion that a proceeding should be terminated, despite the existence of unfair (dumped and/or subsidised) trade, the standards applied must be high. Given the diversity of situations analysed, it is neither feasible nor appropriate to set clear thresholds above which the imposition of measures may be considered a priori to be against the Community interest.

The Community interest analysis consists of the identification of any compelling reasons which would lead to the clear conclusion that measures would not be in the global interest of the Community. In other words, it must be found that the disadvantage for certain interested parties such as users, importers or consumers, would be clearly disproportionate to any advantages given to the Community industry by the imposition of measures. Although a clear disproportionality finding is relatively rare, a number of cases have been terminated without measures on grounds of Community interest.

It should be underlined that the type of analysis to be carried out in the Community interest test is of an economic nature. Political considerations and arguments relating to broader policy areas (e.g. foreign policy, labour standards, regional policy) are not within the scope of the examination. The Community interest test is also not a cost-benefit analysis in the strict sense. In other words, while the various interests (advantages and disadvantages) are put in balance, they are not weighed against each other in a mathematical equation, not least because of obvious methodological difficulties in quantifying each factor with a reasonable margin of security within the time available.

The Community interest test addresses in particular the viability and future perspectives of the Community industry with and without measures, as well as the likely impact of measures (or their absence) on other interested parties such as importers, suppliers, users or consumers.

The assessment of the impact on interested parties must be made in the light of a proportionality test. When measures are not likely to bring any benefits to the Community industry, any increase in costs for users, importers or consumers - even a very tiny one - would be disproportionate. However, when measures are likely to improve the situation of the Community industry, a certain increase in costs for other parties will generally be considered to be tolerable.

The Community Interest Test in Anti-dumping and Anti-subsidy Proceedings

The main purpose of the Community interest test is to decide whether there are particular reasons not to impose measures in a given proceeding, despite a finding that the dumped or subsidised imports caused material injury to the Community industry. Since the application of this test can lead to the termination of a proceeding, despite the existence of unfair (i.e. dumped and/or subsidised) trade, the standards applied must be high. Considerations of Community interest should be overriding in order to prevail over the interest of the Community industry to compete on a level-playing field.

The steps undertaken in the analysis of the Community interest and the parameters to be assessed are clearly set by a consistent practice of the Community Institutions. The micro-economic industrial realities analysed are very diverse, as are the interests at stake. Hence, any thresholds above which the imposition of measures may be considered a priori to be against the Community interest are neither appropriate nor feasible.

1. *LEGAL BASIS*

The legal basis for the Community interest test is Art. 21 of the basic anti-dumping Regulation[87], which calls for an 'appreciation of all the various interests taken as a whole'. In this global appreciation, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition is given special consideration. The test to be carried out by the Community Institutions is a negative one, i.e. measures may not be applied where it can be clearly concluded that it is not in the Community interest to apply such measures.

Notes

[87] For anti-subsidy investigations, the legal basis is Art 31 of the basic anti-subsidy Regulation. In the remainder of the text references to anti-dumping should be understood as covering anti-subsidy as well.

The basic Regulations also specify the procedural aspects of the Community interest test, for instance the fact that any conclusions must be based on substantiated submissions made by interested parties and that these parties have extensive procedural rights and obligations. Finally, the Community interest provisions also set out a non-exhaustive list of interested parties which are directly concerned by the product under investigation. The parties mentioned are the complainants, importers and their representative associations, representative users and representative consumer organisations. Although suppliers are not explicitly mentioned in Art. 21, it is a standing practice to also consider their interests in the global analysis which is required.

Exporting producers are not considered as interested parties in the framework of the Community interest analysis. Nevertheless, the substance of the arguments which they put forward may be examined in order to have a broader, more exhaustive analysis. Furthermore, exporting producers receive final disclosure of the facts and considerations relating to Community interest.[88]

It should be noted that the Community interest test does not reflect any equivalent WTO provision, as the WTO Anti-Dumping Agreement does not require - but neither prevents - a public interest test. It is thus a rather unique feature of EU law. Although some kind of public interest test has meanwhile been included in different forms in the legislation of some other WTO members, the Community appears to be the only WTO member who consistently applies it in such an elaborated and systematic way.[89]

2. *NATURE AND CONTENT OF THE ANALYSIS*

2.1. A global proportionality assessment of the economic effect of measures on different groups of interested parties

Once the existence of injurious dumping has been established, there is a presumption for the need to apply measures unless compelling reasons lead to the clear conclusion that these measures would not be in the Community interest.

The analysis required consists, firstly, of an evaluation of the likely consequences of the application or non-application of the envisaged measures on the interests of the Community industry and of other parties covered by the scope of Article 21.[90] This means basically that a prospective assessment has to be made in order to establish for each group of economic operators the likely effect of taking or not-taking measures. While such prognosis has to work with hypotheses, it is not speculative but based on factual data, past experience and evidence. This is not only the case for the Community industry, where the effect of the absence of measures can be deduced from the injury analysis, but also for other parties (e.g. data on past experience can show to what extent users can pass on a cost increase following an increase in the cost of raw materials).

Secondly, all the different interests examined have to be balanced against each other. In other words, it must be found that the disadvantage to the other interested parties would be clearly disproportionate to any advantages given to the Community industry by the imposition of measures. A clear disproportionality finding is relatively rare, as normally the negative impact of measures on certain parties is rather limited as compared to the benefits for the Community industry. Indeed, in the vast majority of cases, the positive effects of measures for the Community industry outweigh the possible negative impact on, for example, users and consumers. If, however, measures would e.g. not bring any benefit to the Community industry, their imposition would always be disproportionate. This would be the case where it is found that the Community industry is not viable anymore, and that even the imposition of measures could not be expected to allow its return to viability. It would also be the case if the Community industry would clearly not benefit from measures for other reasons, e.g. because substitute products would take over. In these particular cases, the application of anti-dumping measures would serve no purpose.

It should be borne in mind that the Community interest is that of the Community of 25 as a whole, intended as a single market. It should not be confused with the national interest of individual Member States, nor should it be considered as the mere sum of the interests of the 25 individual Member States. Through their regular contacts with different categories of economic operators, Member States obtain information on the interests of all parties concerned and are well-placed to check the Commission services' evaluation with the feedback from those parties, when taking a position on the interest of the EU 25. However, it should be recalled that information which was not submitted to the investigating authorities, cannot be used as a basis for the findings. Member States have in this respect an important role in

Notes

[88] Joined Cases T-33/98 and T-34/98 *Petrotub SA and Republica Sa v. Council* [1999] ECR II-3837 (204).

[89] Other traditional users of the AD instrument, such as US and Australia do not apply a public interest test. The legislation of Canada provides for a public interest test, but it is not applied in such a systematic way as in the EC and its practical impact seems to be rather limited. Some new users (e.g. Argentina, Brazil, Zimbabwe, Malaysia) have also included the possibility to apply some kind of public interest test in their legislation, the contents and effect of which are however unclear.

[90] See Case T-132/2001 *Euroalliages et al. v. Commission* [2003] ECR II-nyp (47).

encouraging parties with whom they may be in contact, to participate in the investigation and to transmit any relevant information in their disposal to the Commission services.

The type of analysis to be carried out is a micro-economic assessment of the likely impact of theimposition or non-imposition of measures on the directly interested economic operators in the Community. It must focus on the situation of companies likely to be directly affected by the measures. This means that, normally, the analysis will go one step up or down in the chain of economic operators involved in dealing with the product concerned. For products not commonly sold at retail level, consumer organisations are to be involved if they can demonstrate an 'objective link' with the product concerned by the investigation.[91]

It follows from the above, that the Community interest test is not a cost-benefit analysis in the strict sense, i.e. while the various interests (advantages and disadvantages) are put in balance, they are not weighed against each other in a mathematical equation, not least because of obvious methodological difficulties in quantifying each factor with a reasonable margin of security within the time available, and because there is not just one generally accepted model for a cost-benefit analysis.

2.2. New investigations and reviews

It should be noted that the Community interest test is not only required in new investigations, but also has to be performed in expiry reviews[92] and full interim reviews. There, the essentially prospective analysis to be carried out, can use concrete evidence of the past impact of existing measures as an important source of information. For example, if it was found in the original investigation that the imposition of measures would in all likelihood not substantially affect users or importers, and none of these parties submits any comments in the review investigation, it can be reasonably concluded that any negative effects on them are negligible.[93] However, the examination of the past impact of measures cannot replace the requirement to carry out a new assessment of the consequences of maintaining measures and the balancing of the interests at stake. Indeed, it cannot be automatically presumed in an expiry review that, even if the likelihood of recurrence of dumping and injury has been established, measures would still be in the Community interest. Since circumstances might have changed, and since the corresponding test in the original investigation took only account of the normal lifetime of measures (i.e. five years), a new analysis of the Community interest is to be performed.[94] It should also be noted that changed circumstances with regard to the Community interest can be a sufficient ground for the initiation of an interim review.[95]

2.3. What is not covered by the scope of the Community interest test ?

The focus of the analysis is on the economic effects on the interested parties. In this respect the question might be raised whether the test should also cover certain broader considerations (e.g. foreign policy, environmental policy, labour standards, regional policy, macro-economic effectsof measures) that are sometimes invoked as relevant in the context of the imposition or non-imposition of measures, although the alleged link might be rather indirect.

As a general rule, taking this type of considerations into account would conflict with the precision and technical nature of the investigation and the instrument. Moreover, the above mentioned broader topics are already covered by specific legislation, which includes public interest considerations. Concerns relating to such broader aspects should consequently be addressed by other means than anti-dumping measures, in the appropriate respective context. Indeed, trade defence instruments should not be used as a means to enforce legislation, implement policies or address particular problems in other areas. In any event, the impact of such concerns at the micro-economic level of the interested parties is generally not likely to be material enough to rival with more direct price-related considerations.

For example, in *Lamps* it was argued that the imposition of measures was against the Community energy saving policies, as measures would result in the increase of retail prices for consumers and thus reduce the sales of energy saving lamps. This argument was rejected since the Community interest analysis focuses on the economic impact of measures on the economic operators concerned and the Community industry cannot be expected to bear the costs of the Community energy saving policies through suffering from unfair trade practices. In any event, it was also noted that, in the unlikely event of a

Notes

[91] Case T-256/97 *Bureau Européen des Unions de Consommateurs (BEUC) v. Commission* [2000] ECR II-101.

[92] See Case T-132/2001 *Euroalliages et al. v. Commission* [2003] ECR II-nyp (38 et seq).

[93] See e.g. Expiry review on **magnesium oxide** from China.

[94] See Case T-132/2001 *Euroalliages et al. v. Commission* [2003] ECR II-nyp (58).

[95] For further details on this issue, see Council clarification paper nr. 17.

price increase, there would still be a strong economic incentive for consumers to buy energy saving lamps.

On the other hand, considerations relating to general policy areas (e.g. environment) might exceptionally indirectly play a role, to the extent that they are linked to, or coincide with, the interests of certain interested parties. For example, in *PSF* it was considered that the imposition of duties would contribute to guarantee the viability of the PSF industry, which holds a central position in the recycling of PET bottles, as they are the main customer of the recycling industry (they consumed 70 % of the recycling of PET bottles during the IP). Since waste management and recycling are a priority of the Community, the measures would thereby also indirectly contribute to the achievement of environmental objectives.

Finally it should be noted that arguments relating to alleged economic advantages in exporting countries (e.g. lower wages) can clearly not be invoked against the imposition of measures, as the Community interest test is performed once a positive finding of dumping has been made.

3. *THE ANALYSIS OF THE COMMUNITY INTEREST*

3.1. Collecting information

As stated above, Community interest findings must be based on concrete evidence collected from interested parties. The data collection and analysis should in precision and procedure resemble that carried out for the other aspects of the investigation, i.e. the establishment of dumping, injury and causal link, in order not to create a big disparity in the investigation. For this information collection, the Commission follows a proactive approach by inviting parties to participate in the Community interest investigation and to reply to the questionnaires sent to them. In particular, all interested parties known to be concerned and the relevant associations are contacted.[96] This includes Community producers, users and consumers, importers and traders, as well as the upstream industry (e.g. providers of raw materials or machinery). The time-scale for the completion of questionnaires is set out in the notice of initiation of an investigation. The Commission services try to accomodate any requests for extension of deadlines and, to the extent possible, and due account being taken of the obligation to ensure a non-discriminatory treatment, also to take into account late
submissions of information. When Member States are in contact with economic operators that can provide relevant information, they are strongly invited to encourage them to fully cooperate in the investigation.It must be pointed out, however, that cooperation in this respect is often poor: very often numerous parties do not come forward or do so too late in the investigation. They frequently provide only unsubstantiated or unverifiable information or limit their submission to some mere statements in favour or against the imposition of measures. This hampers a detailedanalysis of the economic impact of the measures on the interested parties (e.g. quantification of the likely cost increase for users) and forces the Institutions to resort to the use of (partial) facts available, e.g. from available statistical databases, economic studies, sectoral information or also previous investigations.

3.2. The assessment of the different interests at stake

The interested parties have different, and usually even conflicting, interests *vis-à-vis* the imposition or non-imposition of measures. It is therefore necessary to identify and assess these various interests in order to finally balance them against each other.

Cooperation for each group of economic operators differs significantly from case to case, but is often poor. In cases where within a certain category only a few parties cooperate, special attention must be paid to their representativity for that industry as a whole. For the purpose of the Community interest analysis, the representativity of submissions for the sector concerned does not depend on their number or market share, but rather on whether the companies constitute a typical sample of the different categories of economic operators of that sector.[97]

In practice, the following elements are normally addressed:

1) *Relevant interests of the Community industry*

a. *Analysis*

When injurious dumping has been established, it can be presumed that anti-dumping measures are not against the

Notes

[96] In order to identify those interested parties and relevant associations, the Commission services use in particular information requested from the Community industry, information collected in other investigations or information which is generally available (databases, sector information, Internet etc.). It should be noted in this respect that there are limits to the information that can be expected to be provided by the Community industry. If, for example, the Community industry was forced to name all its customers in all cases in the annex identifying the users, it would rightly complain that such annex would become an easy way for exporters to get in contact with these customers, which cannot be the purpose.

[97] See also Case T-132/2001 *Euroalliages et al. v. Commission* [2003] ECR II-nyp (90).

interests of the Community industry. The analysis will therefore focus on the proportionality of the measures. Two aspects are particularly important in that respect.

First of all, the viability and future perspectives of the Community industry are looked at. Measures serve a purpose only if the Community industry is viable or has good perspectives to restore its viability and compete on the Community market if measures are imposed. If however an industry does not have the potential to recover and play a role on the Community market in terms of market share, production capacity, technology etc., anti-dumping measures would always have to be considered as disproportionate, even if the negative effect on other interested parties was very small.

Secondly, an analysis must be made of the likely effects of measures, or their absence,on the Community industry. These effects will vary, for instance, depending on whether the Community industry is likely to maintain its price level and increase its market share, as a consequence of the measures, or can rather be expected to raise prices and maintain the current market share with the price increase being passed on to the consumers. Furthermore, particular attention is given to the potential impact of measures, or their absence, on employment. In general, the higher the expected benefits for the Community industry in terms of, in particular, likely increases in sales volumes, market share, prices and profitability, and saved or created employment, the higher the weight of these considerations when balanced against any possible negative effect on other interested parties. If the Community industry would not, or only marginally, benefit from measures, for example because the market share of the dumped imports is likely to be taken over entirely by non-dumped, but equally low-priced imports from third countries, measures would not be justified.

b. *Examples*

*In **Laser Optical Reading Systems (LORS)**, it was found that the Community industry producing disc changers (a component of LORS) was still in a nascent phase. The Community industry was set up in an environment of depressed prices, at a moment when the product was already well-established on the market, i.e. at a very late stage, and was still only reaching a market share of 1,4 % during the investigation period. Under these circumstances, the future perspectives and viability of the Community industry were unclear. Therefore measures were not imposed, also in the light of the fact that any advantages for the Community industry were likely to be minimal given the relatively low level of employment affected, and were clearly disproportionate when weighed against the interests of consumers, importers and traders.*

*Similarly, in the **Ferro-silicon** expiry review the investigation showed that the Community industry had not been capable of benefiting sufficiently from the measures in place. This was evidenced in particular by its failure to maintain its market share, its deteriorating profit, the closure of two companies and the reduction of employment in the remaining companies, even though imports from the countries concerned had almost disappeared. At the same time, the Community steel producers had had to bear negative effects of measures in the form of additional costs for many years. Since it was therefore not clear that maintaining measures would provide sizeable benefits to the Community industry, while it would unduly prolong the long-term negative effects for the steel industry, it was concluded that maintaining the measures would be contrary to the interests of the Community industry.*

*In **synthetic handbags**, it was found that it was not likely that the Community industry would benefit from any anti-dumping measures imposed, since synthetic handbags would in all likelihood be sourced from other third countries, not subject to measures, in the medium term. Consequently, most of the volume and price benefits from anti-dumping measures could be expected to go to exporters in third countries and not to the Community industry. Moreover, the consequences of the non-imposition of measures on employment in the Community synthetic handbags sector were relatively limited (ca. 500 jobs) as compared to the employment in the corresponding distribution sector (ca. 4 100 jobs). Finally, a comparison of the market shares of the Community industry (2 %) and the imports concerned (80 %) indicated that the impact of any measures on importers and traders would be clearly disproportionate to any possible benefit in the short term to the Community industry. Under these circumstances, and in view of the concurring significant impact which measures would have on consumers, importers and traders, no measures were imposed. The situation was, however, completely different for the **leather handbags** industry, which was found to be a viable, competitive industry, holding a significant share of the Community market and adding substantial creative value to the product in the form of know-how, design, innovation and quality. Measures on leather handbags were therefore found to be in the interest of the Community industry.*

*In **personal fax machines**, it was found that the Community industry continued to invest and to develop its own type of personal fax machine which would be shortly introduced on the market. The imposition of measures would enable the Community industry to maintain and further develop its activities in the Community. Furthermore, the imposition of measures was likely to save around 370 jobs directly linked to the product concerned and to positively affect around 4000 jobs. Overall, based also on other considerations, it was concluded that measures should be imposed.*

*In **Sulphanilic acid** it was found that there was no reason to doubt the viability and competitiveness of the Community industry under normal conditions of fair trade, even though one of the two Community producers constituting the Community industry had filed for protection from its creditors and its activities were being overseen by an administrator appointed by the Court of Commerce. The latter company would continue to exist for the immediate future and would therefore be in a position to benefit from measures. Moreover, the investigation showed that the Community industry had plans to increase its production*

capacity in order to meet the growing demand, but that these plans had to be deferred because of the low price level caused by the dumped imports. The imposition of measures would allow the Community industry to increase its sales volume and prices,thereby generating the necessary level of return to justify continued investment. If no measures were imposed, losses of the Community industry would continue and the company mentioned might not survive.

A case involving a vertically integrated industry was ***Tungstic oxide and tungstic acid****. After the imposition of measures on tungstic oxide and acid originating in China, the Community industry continued to integrate vertically. The subsequent expiry review showed that most of the sales of the Community industry were captive. In addition, the Community industry was also integrated upstream, and sourced the raw material for tungstic oxide and acid from China as well. In these circumstances, it was not clear to what extent the industry's production chain was at risk in the absence of measures. Moreover, the industry was found to be vulnerable anyway given the very high dependence on supply of raw materials from China. In addition the effectiveness of the measures was doubtful and measures had negative effects on users. However, since already the likelihood of recurrence of injurious dumping was not clearly established, measures were not maintained for that reason, without the Community interest test being decisive.*

In the ***Salmon*** *case it was concluded that the imposition of measures on imports from Chile would be inefficient since the Community industry was not likely to benefit from them. On the one hand, it was doubtful whether measures would lead to a price increase, given the small market share of Chilean salmon and of the Community industry, vis-à-vis other sources that may not increase prices. On the other hand, even if measures were to trigger a price increase to the benefit of the Community industry, the negative effects on other interested parties, and the resulting transfer of wealth to those producers/exporters in countries not subject to measures would greatly exceed the benefit to the Community industry.*

By contrast, in the ***DRAMs*** *case it was found that the Community industry was viable under normal market conditions. Following substantial rationalisation the remaining producers had made great efforts to keep at the front end of technological developments and were considered to be very competitive in world terms. Their situation had deteriorated sharply due to the subsidised imports from Korea which had led to very low prices. These in turn, had adversely affected the ability of the Community industry to remain profitable and to invest in order to remain competitive. In the absence of measures, the precarious situation of the Community industry would deteriorate to a point where its very existence could be at risk. The disappearance of this technologically advanced industry, with more than 10 000 employees, would have a significant negative effect on employment. Moreover, entry costs in the market are high and re-entry by existing producers or new ones would be unlikely. Therefore, measures, which would re-establish fair competition, were in the interest of the Community industry.*

The review investigations on ***GOES*** *found that the Community industry was viable and capable of benefitting from the protection offered by the anti-dumping measures. This was shown by its ability to improve its situation and restore a satisfactory level of profitability. Furthermore, the Community industry had made strong efforts to restructure and rationalise its production in order to remain competitive at Community and world level. As it was, however, still in a vulnerable situation, its efforts would be jeopardised if measures lapsed and dumping recurred.*

2) *Relevant interests of importers and traders*

a. *Analysis*

Since anti-dumping measures may have a considerable impact on the situation of importers and traders, the likely effect of measures on their economic position has to be considered in the Community interest analysis. In this respect, the mere fact that measures will lead to a cost increase for importers, can as such not be a reason not to impose measures. The analysis will rather focus on elements such as the importance of the product concerned for the business activity of the importers (does it represent only a minor part or a major share of the total turnover of the importers ?), their profit margins and the possibility to pass on cost increases to the purchasers. Furthermore, the availability of alternative sources of supply will be taken into account.

In this context it is often also argued that the Community production is insufficient to meet the entire demand within the Community, and that therefore imports are necessary. This argument is in general not valid as such, as anti-dumping measures are not intended to exclude the dumped imports from the Community market, but to ensure that they compete on a non-dumped or non-injurious price level with other suppliers on the Community market. Moreover, in most cases it is found that the imposition of measures does not lead to any problem of supply. Should there nevertheless be a risk of lack of supply, this would of course have to be taken into consideration in the analysis.

While normally importers will argue that the imposition of measures is not in their interests, it should be noted that this is not necessarily always the case. For certain products, it may happen, for example, that due to the speed of innovation the price of the dumped imports has fallen to such an extent, that the profit margin of the importers has become too small. In such, admittedly more exceptional cases, the imposition of measures might be also in the interests of importers, as it might lead to an upward adjusted price level. Furthermore, measures can also be in the interest of importers, which also act as traders.

With respect to traders, the potential effect of measures on their situation depends on the product mix of the traded goods. To the extent that they also trade in the Community produced like product, their interests will

coincide with those of the Community industry. Therefore, for traders selling both imported and Community produced products, the respective positive and negative effects of measures may often neutralise themselves.

As regards the potential impact on employment, importers will normally be less affected by the imposition of measures than the Community industry in case of non-imposition of measures, since importers in general produce less value added and thus less jobs are normally concerned. Furthermore, they usually also import other products and can in addition switch to other supply sources. Moreover, while employment in the Community industry might include high-qualified jobs requiring special know-how which the Community has an interest to keep, this is usually less the case for importers or traders. The interest of the Community industry might therefore generally prevail. So far there have not been cases where measures were not imposed only on the basis of the interests of importers or traders.

b. *Examples*

*In **Glyphosate** it was considered that, since most importers dealt with a range of products other than glyphosate, the impact of measures on their overall business would be limited. Moreover, the price decrease of glyphosate which importers expected if measures lapsed, would only have a limited financial benefit for importers, since they would be forced to pass on the bulk of their cost decrease to their customers due to competition.*

*In **Hollow sections** the investigation showed that the product concerned represented on average about 12 % of the cooperating sampled importers' total turnover. The proportion of employees directly or indirectly involved in the trading of the product concerned represented only 23 % of a total staff of 107 employees of these importers. Furthermore, the low proportion of the product concerned in the total costs of users should make it easier for importers to pass any price increase on to users. Therefore it was concluded that measures would not have a significantly negative effect on importers.*

*In **Bed linen** from Pakistan it was also found that only a small share of the turnover of the cooperating importers was generated by sales of the product concerned and that there were many other sources of supply. Therefore the impact of anti-dumping measures on these importers could be considered as minor.*

*Similarly, in **Welded tubes**, it was concluded that measures were not likely to have a significantly negative effect on the situation of importers/traders in the Community since the product concerned represented on average only 10 % of their total turnover and they were likely to pass any increase in prices of the product concerned on to users.*

*Conversely, in **CD-Rs**, the imposition of measures was found to be also in the interests of importers. Prices of the dumped imports had decreased to such an extent that a normal trading contribution margin was no longer sufficient to cover the importers' overhead costs. Moreover, the decrease of market prices occurred at such a pace that importers were faced with rapid value deterioration of goods in transit, creating a situation in which the purchase price occasionally exceeded the eventual sales price. Under these conditions it was found that measures would serve the interests of importers by restoring an adequate sales price level on the Community market.*

*In **Tube and pipe fittings** it was found that a number of importers also traded in Community produced tube and pipe fittings, that only a low number of companies importing from the countries concerned objected to measures and that supplies from third countries with no duty would still be available. Therefore measures would not have a significant negative effect on importers or traders.*

3) *Relevant interests of suppliers*

a. *Analysis*

The likely impact of measures on the upstream industry will mainly depend on the extent to which they are economically dependent on the Community industry.

In principle, the positive effect of measures for the Community industry will have direct positive consequences for the suppliers, especially if both industries closely work together. Similarly, a likely deterioration of the situation of the Community industry will negatively impact on the position of the upstream industry. Thus, considerations regarding the interests of suppliers often reinforce the appreciation of the Community interest in favour of measures.

If the upstream industry also supplies the exporters, the possible negative effects of measures on their position will normally be outweighed by the positive effects on the Community industry, from which they also benefit. The existence of a strongly export-oriented upstream industry may exceptionally also speak against the imposition of measures or can alleviate the negative consequences of the non-imposition of measures.

The interests of upstream suppliers located outside the Community are not taken into consideration in the analysis in line with the treatment of exporters in the exporting country concerned.

b. *Examples*

*In **PTFE** the investigation showed that the majority of raw material suppliers worked closely with the Community industry and derived a high a large part of their turnover (75 %) from sales to granular PTFE producers. Therefore any reduction in the Community industry's purchases would have a significant effect on the situation of suppliers. Moreover, it was argued that without the imposition of measures there was a risk of delocation of the Community industry to third countries. This would force the suppliers to search for clients outside the Community, where they would be in competition with traditional indigenous suppliers of raw materials and face additional export costs, which*

would further erode their already low profit margins. It was therefore provisionally concluded that the imposition of measures was in the interests of the upstream industry.

In ***Welded tubes*** *it was found that the co-operating producers of the main raw material used in the product concerned (hot-rolled coils), which employed around 92 000 people, were likely to face a reduction in demand if no measures were imposed. Moreover, as they had already faced unfair competition in the past, they would have even more difficulties in recovering from past dumping. With the imposition of measures, the upstream industry would continue to benefit from the existence of a demand of hot-rolled coils in the Community. Measures were therefore in their interest.*

4) *Relevant interests of users*

a. *Analysis*

The interests of the downstream industry, which uses the product under investigation for further processing, will depend on whether they predominantly purchase from the Community industry, from the dumping exporters or from third countries. The degree of their dependence on each of these sources of supply determines the impact of measures. Furthermore, the importance of the product under investigation for the final product manufactured by the users, and the potential cost impact of measures play a crucial role.

The fear for a cost increase and the negative consequences for the user industry resulting therefrom, is typically the main argument invoked by users against the imposition of measures. Any increase in the cost of a processing industry's raw materials may indeed affect its ability to compete with other processors both on the Community market and in third countries. For users which mainly purchase their inputs from the dumping exporters, the negative effects of measures on their cost structure can be considerable.

However, the assessment of the impact on users is often hostage of misconceptions. Since the product under investigation will typically be only one of several input factors for the user industry, it is normal that this latter industry is larger, has higher employment and a larger turnover than the Community industry. Thus, while employment considerations are obviously taken into account, a simple comparison of employment or of number of companies is not appropriate for the analysis. Similarly, it would not be adequate to only consider the absolute amount of likely cost increases for users due to the imposition of measures. Otherwise, the whole exercise would be meaningless, since almost by default no measures would be imposed.

In practice, the investigation will first establish how much the product concerned represents in the cost of production (and not, as interested parties frequently claim the costs of raw materials or cost of manufacturing only) of the users. Thereafter, the likely cost increase following the imposition of measures has to be determined. The latter analysis focuses mainly on two aspects. First of all, in order to determine the likely cost increase, account will be taken of alternative sources of supply. For example, the availability of non-dumped imports from the country concerned, from the Community industry or from third countries, or the existence of exporters with comparatively low anti-dumping duties would allow users to switch to these sources, thereby limiting the effect of measures.

Secondly, the likely cost increase for the users will be determined, as compared to their profitability situation (in other words, the impact on the net margin). In this respect, it is important to consider whether or not the user industry would be likely to pass on any cost increases to the next stage of the economic chain. This, naturally, encompasses a consideration of the competitive situation of the user market. Where users are exposed to strong competition, it may be more difficult or even impossible to pass on a cost increase. In that scenario the negative impact of measures would carry a relatively high weight in the global assessment, especially if the product concerned represents an important part of the production costs of the users and if their proft margins are already low. If however measures would lead to a general price increase, affecting all economic operators in the same way, the cost increase for the users would be neutralised or at least mitigated. For the assessment of the likely impact of measures on the situation of users, evidence on cost increases in the past can be an important source of information to take into consideration.

The determination of the likely cost increase is often complicated by the lack of full cooperation from the user industry. If no precise information in this respect is provided, conclusions have to be reached on the basis of the facts available, which may not allow a representative, arithmetical quantification of the effects of the measures on the downstream industry. The lack of cooperation from users can indicate that the product concerned represents only a small part of their cost of production and that they would not be significanty affected by anti-dumping measures. In exceptional cases, however, e.g. when SME are involved, low cooperation might also be due to resource considerations. This problem, however, exists also for other aspects of the investigation.

Finally it should be noted that users sourcing from the Community industry can in principle benefit from the improved situation of their suppliers and also have a

competitive advantage as compared to other users, which after the imposition of measures will face higher costs.[98] However, to the extent that they compete with companies from third countries that continue to have access to the dumped imports, they can have a competitive disadvantage both in the Community and on third country markets, which has to be taken into consideration in the analysis.

The assessment of the impact on users must be made in the light of a proportionality test. It must take into account the likely positive impact of measures on the Community industry and other interested parties. When measures are not likely to bring any benefits, any increase in costs for users - even a very tiny one - would be disproportionate. However, when measures are likely to improve the situation of the Community industry, a certain increase in costs for users will generally be considered to be tolerable. At the same time, the level of cost increase above which measures would be disproportionate will depend on many factors. These would certainly include the level of competition on the market, the current level of profitability compared to that of the Community industry, the availability of other sources of supply, the employment involved, etc.. Therefore, a fixed threshold above which any increase in costs would be disproportionate cannot be set.

b. *Examples*

*In **gum rosin** from China, it was found that the imposition of measures would lead to a substantial cost increase for users from numerous, high added value industries, supporting a large number of jobs. In addition, the imposition of anti-dumping measures would not be adequate to remove the injury, since it would provoke a significant increase in the price of gum rosin, which would render more expensive substitute products competitive. This would result in a quick penetration of the Community market by those substitute products, with a consequent global increase in costs. In comparison, measures would have only benefited SMEs located solely in one Member State. As the negative effects of measures were therefore disproportionate to the benefits for the Community industry, no measures were imposed.*

The following cost increases were found not to be disproportionate in the circumstances of the case:

*In **Magnesia bricks** the product concerned represented significantly less than 1 % of total costs; so that the anti-dumping duties would only have a marginal influence on the total costs in the steel making process.*

*In **PSF** users claimed that they operated in a highly price sensitive market and that even a small cost increase could not be passed on to the final customer due to the already firece competition in the end-product market. However, it was found that the likely cost increase for the downstream industry would be in the region of 0,40 % so that, even if this could not be passed on to customers, the impact on the financial situation of users would not be significant.*

*In **PET** it was concluded that the cost of PET for mineral and spring water producers only represented 3 cents at the level of the end-consumer, or 6-10 % of the retail price, which means that a 10 % price increase would entail a possible maximum price increase of 0,6 % to 1 % at the level of the end consumer, if all the costs are passed on. This increase was not considered significant because it could either be absorbed by the downstream industry or passed on to retailers or end-consumers. Similarly, as regards the soft drink producers, the same increase of 10 % of PET prices would entail a minor 0,3 % increase of the price for end-consumers. As this increase is marginal, the users could be expected to be able to pass it on to the retailers and the end-consumers.*

*In **Sodium cyclamate** the possible financial impact of measures was found to be significantly below 1 % of the total manufacturing costs of the cooperating user, which was not considered to unduly affect the interests of users.*

*In **Graphite electrode systems** the investigation showed that the possible cost impact on users would be between 0,15 (worst case scenario) and 0,03 % (more favourable scenario), depending on whether the prices of the Community industry and those of the imports concerned would both increase by the level of the duty (between 12 and 20 %), or only the imports would increase by this amount. A cost increase somewhere in the middle of both hypotheses was considered the most realistic scenario as the Community industry had also spare capacities and could therefore increase production (thus achieving economies of scale), while the price increase was likely to be moderate. It was found unlikely that such limited cost increase for the users would seriously affect their financial situation.*

*In **Urea** it was found that in a worst case scenario, measures would result in an average cost increase of 0,6 % for farmers using urea as their only fertiliser. However, given that importers/traders would probably not pass on the duties in full and that farmers increasingly sourced urea from other countries not subject to measures or from the Community industry, it was found highly unlikely that farmers would feel this full impact. For the same reasons the possible hypothetical impact on industrial users of 3,2 to 4,2 % in the worst case scenario, was not very likely. This was confirmed by the absence of comments by industrial users on this assessment. Therefore, the impact on users was not such as to make the imposition of measures against the Community interest.*

*In **Sulphanilic acid** the Commission sought to quantify the possible financial impact of measures on users by taking into account both the origins of their sulphanilic acid purchases and its share in their overall manufacturing costs. As measures were*

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[98] While prices of the Community industry might rise, they will normally not increase to the same extent as the imports plus duty because the Community industry typically benefits from measures via economies of scale. Moreover, it should be recalled that, since prices have often dropped before the imposition of measures, the increase is just a readjustment to the normal price level.

based on the dumping margins, it was assumed that prices of imports from the countries concerned would increase by the duties. On that basis it was found that measures would increase the full costs of optical brighteners by somewhat less than 1 % , of dyes and colorants by somewhat less than 1 % and of concrete additives by less than 2 %. For the latter group of users, it was also found that the turnover of products containing sulphanilic acids represented a very small part (less than 5 %) of the total turnover of the cooperating companies. Overall it was concluded that the imposition of measures would slightly affect the financial situation of users, but would not endanger their overall activities or lead them to relocate their production outside the Community.

*In **Zinc oxide** it was found that the imposition of measures would lead to an increase of less than 4 % of total costs for the frit and glaze makers. The investigation showed that they were in a sufficiently strong financial position to be able to absorb this increase, but that they could in all likelihood pass it on to their customers in the tile producing sector. Therefore measures would not have a major adverse impact on their activities.*

*In **Hot-rolled coils** it was estimated that the imposition of an anti-dumping duty of 8 % may prompt an increase of around 1,6 % in the overall costs of the raw materials for the users. This extra cost would cause an estimated increase in the full cost of production of about 1,1 % given the mix of various sources of purchases and the average value added in the down-stream products. This was found not to be such as to endanger the profitability of the user industry and not to outweigh the positive effects of measures on all other operators in the Community market.*

*In **Silicon** users opposed the imposition of measures because of the expected cost increase, but did not provide information to allow an assessment of the impact of measures on their costs or profitability. On the basis of the information available, and following on-spot visits, it was found that the cost increase for metallurgical users would be in the order of EUR 11 per tonne of finished product, i.e. by 0,8 %, which was not considered to be against the Community interest.*

5) *Relevant interests of consumers*

a. Analysis

Consumers are situated at the end of the distribution chain and constitute a rather heterogeneous group whose purchasing decisions cannot always be rationalised in commercial terms (e.g. brand loyalty despite the availability of cheaper substitutes). The possible impact of measures on consumers may therefore be difficult to ascertain. Furthermore, it should be noted that anti-dumping measures normally only have a direct effect on the interests of consumers in proceedings concerning consumer goods. For these reasons the interests of consumers will rarely play a decisive role in the Community interest test.

The assessment of consumers' interests will generally concentrate on two factors. First of all, the danger of price increases, which might result from the imposition of anti-dumping measures and which would have to be borne by final consumers should be considered. As for the users, the impact of the imposition of measures on consumers will depend on the extent to which price increases are passed on to final consumers. In a very competitive market, for example, the Community industry may decide not to increase their prices, or importers from the country concerned may have to reduce their profit margin, so that the final impact of measures on consumers remains limited. Price increases will most likely also be insignificant if exporters from the country concerned already have production plants within the Community. On the other hand, it is often rather normal that anti-dumping measures lead to some price increase (directly for the imports from the country concerned, indirectly for the Community industry, which may adjust to the higher price level). This is ultimately the purpose of anti-dumping measures. Finally, it should be noted that price increases are as such not necessarily a valid argument against the imposition of measures, since the short-term advantage of being supplied with low-priced dumped products may soon disappear, following reduced competition if the Community industry were driven out of the market.[99]

Secondly, the preservation of consumer choice is to be taken into account. The imposition of measures may lead to a restriction of consumer choice if it can be expected that it would result in all or some of the exporters no longer being interested in the Community market. Depending on the level of the measures and the amount of competition this might indeed happen. However, the effect of measures on consumer choice would not be significant if there are many other sources of the product (Community industry, imports from third countries, non-dumped imports from the country concerned), especially if these also offer comparable product types and quality. Moreover, imports from the country concerned should normally also remain available, albeit at higher prices. Finally, there is also no risk of a reduction in consumer choice if exporters from the country concerned have already set up production plants in the Community.

On the other hand, where it is likely that the imposition of measures would not only lead to a reduced choice for consumers but to a real shortage of supply, the

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[99] This problem may not arise if the level of competition from all third countries is high.

interests of consumers may prevail over the interests of the Community industry.

b. Examples

*In **LORS**, it was found that the imposition of measures was likely to severely limit consumer choice, as many exporters would be likely to withdraw from the Community market after the imposition of measures. The consequent loss of choice in the variety of models available could not be compensated in the foreseeable future by the Community industry. The high market presence of the exporters and the fact that they offered a wide model range comprising high quality products,would mean that, if they were to withdraw, consumers would be deprived of taking advantage of technological variety and development, without any viable alternative for the foreseeable future. In that situation it was found that the interests of consumers by far outweighed those of the Community industry.*

*However, **in personal fax machines** a different conclusion was reached. First of all, the increase in costs due to measures was estimated at 6 ECU a year for consumers, a very moderate amount, which would be even further neutralised by the normal price decreases for this product. Furthermore, the consumer would be able to rely on a growing market supply from the Community industry, which was likely to keep its prices stable. It was therefore concluded that the charge to consumers resulting from the imposition of measures would be moderate compared to the benefits of securing the continuation of industrial activities and employment requiring high qualifications in the Community.*

*In **Ring binder mechanisms I** it was found that in a worst case scenario, i.e. should the cost increase that the users might suffer be passed on in full to the final consumer, this would entail a price increase of a maximum of 4 % for the final consumer. However, it was considered that this was unlikely to occur, since experience showed that each step in the distribution chain was likely to support part of its cost increase in order to stay competitive on its market.*

*In **leather handbags** it was found that the effect of the duty on the consumer in the form of a price increase was not likely to exceed 9 %. It was also considered that, leather handbags being a fashion product, not purchased on a regular basis, consumers did not have a clear perception of the appropriate price, so that a moderate price increase was not likely to affect demand substantially in the long term. Therefore it was not expected that the impact of measures on the consumer would be significant.*

*In the **DRAMs** case it was also concluded that consumers would not be significantly affected by the imposition of measures. Even if the DRAMs prices would increase by the full amount of the duty, the impact on the prices of PCs would be limited to around 1 %. However, the effect was likely to be smaller given the chronic overcapacity worldwide.*

*In **Colour television receivers**, it was concluded on the basis of the facts available that the impact of measures on consumers would be limited given the large number of players active in the market, the large number of products which they offered and the high level of price competition between brands.*

6) Competition

a. Analysis

Although not explicitly mentioned in Article 21 of the basic Regulation as a factor to be considered in the Community interest test, the preservation of a competitive situation on the market is a relevant consideration in the context of the assessment of the potential effect of measures on, in particular, the Community industry, users, consumers and suppliers. Indeed, if measures lead to less competition, this may have negative consequences for other parties in terms of increasing prices, reduced choice etc.

The question whether anti-dumping measures could reduce effective competition arises if the Community industry only consists of a limited number of producers with a significant market share. In such situation the danger of reducing competition, creating or strengthening an oligopolistic/monopolistic market structure or a dominant position on the market, must be assessed and taken into account. In this respect, however, the sole fact that a Community producer already has a dominant market position, would not be a reason to consider that his interests are less worthwile of protection against unfair trade. The maintenance of a dominant position is as such not against the Community interest, as long no abuse is made of such dominant position.

Anti-dumping measures may also prevent the creation of a dominant position of the exporter(s), where dumping practices of the latter are likely to drive the Community industry out of the market if no measures are imposed. In that situation competition considerations would plead in favour of measures. Whether or not the risk of a dominant position of exporters exists depends in particular on the number of exporters and the structure of the exporting market(s) concerned.

In general, the risk of a reduction of competition does not exist if enough alternative sources of supply, in particular imports from third countries, remain to ensure effective competition.

Linked to the risk of a reduction of competition is the fear of a shortage of supply. The argument that the imposition of measures may endanger a sufficient supply of the product concerned is often invoked by the user industry. However, in most cases it is found that measures will not lead to any supply problems because, on the one hand, imports from the country concerned will remain available, albeit at higher prices, on the other hand alternative sources of supply exist from third countries or

from the Community industry which may have spare capacity or could increase its capacity. The risk of a supply shortage might also be invoked by other interested parties such as consumers, but is rarely confirmed by the investigation or by subsequent reviews or monitoring exercises.

If the Community industry has been found to engage in anti-competitive practices, the possible reduction of competition following the imposition of anti-dumping measures must be examined with special care.[100] Obviously, measures to protect a cartel cannot be in the Community interest. However, it should be noted that a past infringement of the EC competition rules is as such not a reason to deprive the Community industry from its rights to obtain relief against dumping practices. Furthermore, if the involvement in anti-competitive practices did not relate to the product concerned, it would not be considered relevant in the context of the anti-dumping proceeding.

b. *Examples*

*In **Polysulphide polymers** from the USA it was found that the absence of measures could lead to the withdrawal of the Community industry and thus to a monopoly situation with higher price levels, as only the American exporter would be left on the Community market. Measures would allow the Community producer to stay in the market, thus preserving competition, which was found to be beneficial to users in the long term.*

*In **Glycine** from China (provisional measures), it was found that if the sole Community producer of glycine disappeared from the market, the Chinese exporters would be in a position to supply over 80 % of Community demand, leading to a quasi-monopoly situation. This would in the long term be detrimental to the interest of users. Therefore, measures were provisionally found not to be against the Community interest.*

*Similarly, in **Ring binder mechanisms II** the Community industry was reduced to one company group, after several companies had closed down. Moreover, there were only a few producers of ring binder mechanisms worldwide, mostly Chinese or under Chinese control. In these circumstances, it was considered that should the Community industry cease to exist, this would have negative effects on competition in the Community since users would become almost totally dependent on imports from China and/or from Chinese subsidiaries in third countries. Chinese producers would then have an incentive to substantially increase their price levels which would endanger the competitiveness of user industries.*

*In the **Coumarin** expiry review it had been argued that the existing measures had eliminated Chinese coumarin from the Community market, leading to a monopoly of the sole Community producer. However, it was found that several alternative sources of supply still existed, with Japan and India still having non-negligible market shares, and that there were no indications of anti-competitive practices of the Community producer, whose sales prices had decreased over the period under review. Therefore competition-related concerns were considered not to be a compelling reason against the continuation of the measures.*

*In **Sulphanilic acid** it was found that if measures were not imposed, the Community industry could be forced out of production. This would further reduce the number of suppliers on the Community market, while production outside the Community was already concentrated in relatively few countries. Measures would therefore help to protect the choice of user industries and maintain competition on the Community market.*

*In **Magnesia bricks** from China the user industry had argued that measures would strengthen a market structure consisting of few important producers. However, it was found that the largest producer had around 30 % of market share, which was unlikely to be large enough to control and dominate the market. This was supported by the fact that imports from the PRC had eroded this market share. These imports were likely to continue after the imposition of measures. Moreover, there were a number of small producers in the Community and no evidence was provided on how the large players had dominated the market or on other incompetitive behaviour.*

*In **Paracresol** from China one user industry feared that the complainant Community producer could use anti-dumping measures to reinforce its position and possibly dominate supply and price developments. It was found, however, that duties would not result in a significant reduction of competition or a shortage of supply. Imports from China were expected to remain available at competitive prices, as the duties were below the levels of undercutting found. Furthermore, alternative sources of supply from third countries were available. In addition, it was also expected that the Community industry would increase its production and sales. As there would thus still be a sufficient number of major competitors on the market, users and consumers would continue to have the choice of different suppliers. The shortage of supply that appeared after the imposition of provisional measurest was found to be due to temporary circumstances, such as technical and management problems, both in the Community and in China, which were unlikely to persist. If on the other hand, no measures were imposed, it was considered that the future of the sole Community producer would be at stake and its disappearance would effectively reduce competition on the Community market. For these reasons it was concluded that measures would not have a decisive impact on users and that there were no compelling reasons not to impose measures.*

*In **Glyphosate** it was alleged that two Community producers operated a cartel. However, since no sufficient evidence in this*

Notes

[100] In this respect, DG TRADE cooperates with DG COMP in order to determine whether any anti-competitive practices have been established or are being investigated relating to the product subject to examination. As a matter of routine, contact is established in all cases with very few actors on the market.

respect was provided and no anti-trust proceeding had been initiated, this argument was rejected.

*In **Graphite electrode systems** the Community producers had been involved in a cartel and were fined by the Commission several years before the IP. Since the anti-competitive behaviour had been terminated, it was considered that the Community industry should not be deprived of its right to obtain relief against unfair trade practices.*

3.3. The global appreciation of the different interests as a whole

The Community interest test requires a global appreciation of different, often contradictory interests. After the effect of imposing anti-dumping measures or, alternatively, maintaining the status quo, has been established for each group of interested parties, the different interests have to be weighed against each other. Negative consequences for one group of economic operators might be outweighed by positive consequences for other parties, and vice versa. In this global appreciation, the degree of participation of a group of economic operators and the quality of the data provided plays an important role.

This evaluation cannot be a mathematical, quantitative comparison according to standard parameters, but has to be performed on a case-by-case basis. It is basically an expression of the principle of proportionality, whereby measures would not be in the Community interest if disadvantages to one group of economic operators would clearly be disproportionate to the advantages enjoyed by another one. Whether this is the case will depend on a number of varying factors which need to be balanced against each other in a prospective assessment. These factors are often interlinked and may carry a different weight depending on the circumstances of the case. Therefore it would not be appropriate nor feasible to define general criteria and thresholds, for instance above or below which there would be a presumption that any impact on users would be minimal.

4. *CONCLUSION*

The Community interest test is an important aspect of anti-dumping and anti-subsidy investigations. It requires an assessment of whether there are compelling reasons for concluding that, in spite of a finding of dumping and resulting injury, the imposition of measures would not be in the global interest of the Community. This may be the case if the negative economic impact which measures would be likely to have on one category of economic operators, is disproportionate to any benefits for other groups of interested parties.

The diversity and interlinkage of the interests involved and factors to be taken into account make it impossible to reduce the proportionality analysis to a set of fixed thresholds or pre-determined rules. However, over the years the Institutions have developed a clear practice, reflected in the above examples, which gives guidance on how the Community interest test is interpreted and applied.

Annex: list of cases

Bed linen: Council Regulation (EC) N° 397/2004 of 2 March 2004 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Pakistan (OJ L 66, 4.3.2004, p. 1).

CD-Rs: Commission Regulation (EC) N° 2479/2001 of 17 December 2001 imposing a provisional anti-dumping duty on imports of recordable compact disks originating in Taiwan (OJ L 334, 18.12.2001, p. 8) and Council Regulation (EC) N° 1050/2002 of 13 June 2002 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of recordable compact disks originating in Taiwan (OJ L 160, 18.6.2002, p. 2).

Colour television receivers: Council Regulation (EC) N° 1531/2002 of 14 August 2002 imposing a definitive anti-dumping duty on imports of colour television receivers originating in the People's Republic of China, the Republic of Korea, Malaysia and Thailand and terminating the proceeding regarding imports of colour television receivers originating in Singapore (OJ L 231, 29.8.2002, p. 1).

Coumarin: Council Regulation (EC) N° 769/2002 of 7 May 2002 imposing a definitive anti-dumping duty on imports of coumarin originating in the People's Republic of China (OJ L 123, 9.5.2002, p. 1).

DRAMs: Commission Regulation (EC) N° 708/2003 of 23 April 2003 imposing a provisional countervailing duty on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea (OJ L 102, 24.4.2003, p. 7) and Council Regulation (EC) N° 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea (OJ L 21/2, 22.8.2003, p. 1).

Ferro-silicon: Commission Decision (EC) of 21 February 2001 terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Brazil, the People's Republic of China, Kazakhstan, Russia, Ukraine and Venezuela (OJ L 84, 23.3.2001, p. 36.

Glyphosate: Council Regulation (EC) N° 1683/2004 of 24 September 2004 imposing a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China (OJ L 303, 30.9.2004, p. 1).

Glycine: Commission Regulation (EC) N° 1043/2000 of 18 May 2000 imposing a provisional anti-dumping duty on imports of glycine originating in the People's Republic of China (OJ L 118, 19.5.2000, p. 6).

GOES: Council Regulation (EC) N° 151/2003 of 27 January 2003 imposing a definitive anti-dumping duty on imports of certain grain oriented electrical sheets originating in Russia (OJ L 25, 30.1.2003, p. 7).

Graphite electrode systems: Commission Regulation (EC) N° 1009/2004 of 19 May 2004 imposing a provisional anti-dumping duty on imports of certain graphite electrode systems originating in India (OJ L 183, 20.5.2004, p. 61) and Council Regulation (EC) N° 1629/2004 of 13 September 2004 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain graphite electrode systems originating in India (OJ L 295, 19.9.2004, p. 10).

Gum Rosin: Commission Decision of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China and Taiwan (OJ L 41, 12.2.1994, p. 50).

Handbags: Council Regulation (EC) N° 1567/97 of 1 August 1997 imposing a definitive anti-dumping duty on imports of leather handbags originating in the People's Republic of China and terminating the proceeding concerning imports of plastic and textile handbags originating in the People's Republic of China (OJ L 208, 2.8.1997, p. 31).

Hollow sections: Commission Regulation (EC) N° 1251/2003 of 14 July 2003 imposing a provisional anti-dumping duty on imports of hollow sections originating in Turkey (OJ L 175, 15.7.2003, p. 3).

Hot-rolled coils: Commission Decision No 283/2000/ECSC of 4 February 2000 imposing a definitive anti-dumping duty on imports of certain flat rolled products of iron or non-alloy steel, of a width of 600 mm or more, not clad, plated or coated, in coils, not further worked than hot-rolled, originating in Bulgaria, India, South Africa, Taiwan and the Federal Republic of Yugoslavia and accepting undertakings offered by certain exporting producers and terminating the proceeding concerning imports originating in Iran (OJ L 31, 5.2.2000, p. 15).

Lamps: Commission Regulation (EC) N° 255/2001 of 7 February 2001 imposing a provisional anti-dumping duty on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China (OJ L 38, 8.2.2001, p. 8) and Council Regulation (EC) N° 1470/2001 of 16 July 2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China (OJ L 195, 19.7.2001, p. 8).

Laser optical reading systems (LORS): Commission Decision of 21 December 1998 terminating the anti-dumping proceeding concerning imports of certain laser optical reading systems, and the main constituent elements thereof, for use in motor vehicles, originating in Japan, Korea, Malaysia, the People's Republic of China and Taiwan (OJ L 18, 23.1.1999, p. 62).

Magnesia bricks: Commission Regulation (EC) N° 552/2005 of 11 April 2005 imposing a provisional anti-dumping duty on imports of certain magnesia bricks originating in the People's Republic of China (OJ L 93, 12.4.2005, p. 6).

Magnesium Oxide: Council Regulation (EC) N° 778/2005 of 23 May 2005 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China (OJ L 131, 25.5.2005, p. 1).

Paracresol: Commission Regulation (EC) N° 510/2003 of 20 March 2003 imposing provisional anti-dumping duties on imports of paracresol originating in the People's Republic of China (OJ L 75, 21.3.2003, p. 12) and Council Regulation (EC) N° 1656/2003 of 11 September 2003 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of para-cresol originating in the People's Republic of China (OJ L 234, 20.9.2003, p. 1).

Personal fax machines: Council Regulation (EC) N° 904/98 imposing definitive anti-dumping duties on imports into the Community of personal fax machines originating in the People's Republic of China, Japan, the Republic of Korea, Malaysia, Singapore, Taiwan and Thailand (OJ L 128, 30.4.1998, p. 1)

PET: Council Regulation (EC) N° 1467/2004 of 13 August 2004 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of polyethylene terephthalate originating in Australia, the People's Republic of China and terminating the anti-dumping proceeding concerning imports of polyethylene terephthalate originating in Pakistan and releasing the amounts secured by way of the provisional duties imposed (OJ L 271, 19.8.2004, p. 1).

Polysulphide polymers: Council Regulation (EC) N° 1965/98 of 9 September 1998 imposing a definitive anti-dumping duty on imports of polysulphide polymers originating in the United States of America and collecting definitively the provisional duty imposed (OJ L 255, 17.9.1998, p. 1).

PSF: Council Regulation (EC) N° 428/2005 of 10 March 2005 imposing a definitive anti-dumping duty on imports of polyester staple fibres originating in the People's Republic of China and Saudi Arabia, amending Regulation (EC) No 2852/2000 imposing a definitive anti-dumping duty on imports of polyester staple fibres originating in the Republic of Korea and terminating the

anti-dumping proceeding in respect of such imports originating in Taiwan (OJ L 71, 17.3.2005, p. 1).

PTFE: Commission Regulation (EC) N° 862/2005 of 7 June 2005 imposing provisional anti-dumping duties on imports of granular polytetrafluorethylene (PTFE) originating in Russia and the People's Republic of China (OJ L 144, 8.6.2005, p. 11).

Ring binder mechanisms I: Council Regulation (EC) N° 976/2002 of 4 June 2002 imposing a definitive anti-dumping duty on imports of certain ring binder mechanisms (RBM) originating in Indonesia and terminating the anti-dumping proceeding in respect of imports of certain RBM originating in India (OJ L 150, 8.6.2002, p. 1).

Ring binder mechanisms II: Council Regulation (EC) N° 2074/2004 of 29 November 2004 imposing a definitive anti-dumping duty on imports of certain ring binder mechanisms originating in the People's Republic of China (OJ L 359, 4.12.2004, p. 11).

Salmon: Council Regulation (EC) N° 930/2003 of 26 May 2003 terminating the anti-dumping and anti-subsidy proceedings concerning imports of farmed Atlantic salmon originating in Norway and the anti-dumping proceeding concerning imports of farmed Atlantic salmon originating in Chile and the Faeroe Islands (OJ L 133, 29.5.2003, p. 1).

Silicon: Council Regulation (EC) N° 2229/2003 of 22 December 2003 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of silicon originating in Russia (OJ L 339, 24.12.2003, p. 3).

Sodium cyclamate: Commission Regulation (EC) N° 1627/2003 of 17 September 2003 imposing a provisional anti-dumping duty on imports of sodium cyclamate originating in the People's Republic of China and Indonesia (OJ L 232, 18.9.2003, p. 12) and Council Regulation (EC) N° 435/2004 of 8 March 2004 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of sodium cyclamate originating in the People's Republic of China and Indonesia (OJ L 72, 11.3.2004, p. 1).

Sulphanilic acid: Commission Regulation (EC) N° 575/2002 of 3 March 2002 imposing a provisional anti-dumping duty on imports of sulphanilic acid originating in the People's Republic of China and India (OJ L 87, 4.4.2002, p. 28) and Council Regulation (EC) N° 1339/2002 of 22 July 2002 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of sulphanilic acid originating in the People's Republic of China and India (OJ L 196, 25.7.2002, p. 11).

Tube and pipe fittings: Commission Regulation (EC) N° 358/2002 of 27 February 2002 imposing a provisional anti-dumping duty on imports of certain tube and pipe fittings, of iron or steel originating in the Czech Republic, Malaysia, Russia, the Republic of Korea and Slovakia and accepting an undertaking offered by an exporting producer in Slovakia (OJ L 56, 27.2.2002, p. 4) and Council Regulation (EC) N° 1514/2002 of 19 August 2002 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain tube and pipe fittings, of iron or steel originating in the Czech Republic, Malaysia, Russia, the Republic of Korea and Slovakia (OJ L 282, 24.8.2002, p. 1).

Tungstic oxide and tungstic acid: Commission Decision of 20 March 1998 terminating the anti-dumping proceeding concerning imports of tungstic oxide and tungstic acid originating in the People's Republic of China (OJ L 87, 21.3.1998, p. 24.

Urea: Commission Regulation (EC) N° 1497/2001 of 20 July 2001 imposing provisional anti-dumping duties on imports of urea originating in Belarus, Bulgaria, Croatia, Estonia, Libya, Lithuania, Romania and the Ukraine, accepting an undertaking offered by the exporting producer in Bulgaria and terminating the proceeding as regards imports of urea originating from Egypt and Poland (OJ L 197, 21.7.2001, p. 4) and Council Regulation (EC) N° 92/2002 of 17 January 2002 imposing a definitive anti-dumping duty and collecting definitively the provisional anti-dumping duty imposed on imports of urea originating in Belarus, Bulgaria, Croatia, Estonia, Libya, Lithuania, Romania and the Ukraine (OJ L 17, 19.1.2002, p.1).

Welded tubes: Commission Regulation (EC) N° 540/2002 of 26 March 2002 imposing a provisional anti-dumping duty on imports of certain welded tubes and pipes, of iron or non-alloy steel originating in the Czech Republic, Poland, Thailand, Turkey and the Ukraine (OJ L 83, 27.3.2002, p. 3) and Council Regulation (EC) N° 1697/2002 of 23 September 2002 imposing definitive anti-dumping duties on imports of certain welded tubes and pipes, of iron or non-alloy steel originating in the Czech Republic, Poland, Thailand, Turkey and Ukraine (OJ L 259, 27.9.2002, p. 8).

Zinc oxide: Commission Regulation (EC) N° 1827/2001 of 17 September 2001 imposing a provisional anti-dumping duty on imports of certain zinc oxides originating in the People's Republic of China (OJ L 248, 18.9.2001, p. 17) and Council Regulation (EC) N° 408/2002 of 28 February 2002 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain zinc oxides originating in the People's Republic of China (OJ L 62, 5.3.2002, p. 7).