SUMMARY OF 'EVALUATION OF EC TRADE DEFENCE INSTRUMENTS – FINAL REPORT PREPARED BY MAYER, BROWN, ROWE & MAW LLP'

INTRODUCTION

This paper prepared by the Commission's services describes the context, methodology and results of a comprehensive evaluation study of the Community's trade defence instruments (anti-dumping, anti-subsidy and safeguards instruments) which was submitted on 9 January 2006. The study examined the substantive and procedural rules governing the existing trade defence instruments as well as the practice of the Community Institutions. This was also done in the light of the corresponding US rules and practices. It concluded that the *status quo* is both reasonable and adequate in order to address the interests of all groups of parties concerned.

The study drew attention to some issues where further improvements might be possible. The present paper also describes the proposals made in this respect and gives an indication as to the next steps envisaged by the Commission's services.

CONTEXT AND METHODOLOGY

Commission services carry out regular interim or *ex post* evaluations of their activities and policies, for reasons both of policy effectiveness and of accountability. In relation to policy effectiveness, evaluation helps officials to design or improve policy interventions. In relation to accountability, evaluation helps citizens to exercise their legitimate right to scrutinise, criticise and influence the policies and activities conducted by public institutions in their name. Evaluation therefore contributes to ensuring that work undertaken by Commission services serves the interest of the European citizen.

In 2004, DG TRADE launched an evaluation study of the Community's trade defence instruments. The evaluation had three objectives:

(1) to provide a broad description of the European Community's trade defence practice in terms of institutional arrangements, substantial provisions, administrative procedures and investigation practices, while also giving an account of the United States' practice in this area for the purpose of providing an element of comparison;
(2) to identify and evaluate differences between the European Community and the United States, highlighting their strong and weak points:
(3) to identify possible areas for improvement of the European Community's trade defence laws and practice, with a view to increase their efficiency (e.g. in terms of transparency, enforceability of measures and streamlining of procedures).

The evaluation was based on a survey of stakeholders of the Community's trade defence activities, such as Member States, Community industry, exporters, importers, downstream users and a consumer organization. In other words, this was a 360° evaluation of the trade defence instruments based on the experience of those who are directly concerned by the

application of these instruments, i.e. those who benefit from trade defence measures but also those with adverse interests.[1]

BROAD CONFIRMATION OF THE CURRENT SET-UP OF THE COMMUNITY'S TRADE DEFENCE INSTRUMENTS

The study confirmed that the Community's trade defence instruments and the Community's current practice function well. When making this assessment the study also drew on a comparative analysis of the system employed in the United States, and on the experience gained in the corresponding US instruments and practices. Note however that both systems are not fully comparable as the US operate a so-called retrospective system (which means that the final duty rates payable by importers are established in a system of administrative reviews carried out yearly), while the Community operates a prospective system (which means that the duty rates found in the original investigation are applied to future imports and remain normally unchanged unless a party demonstrates that changes have occurred).

In this respect, the following merits attention :

- The study confirms that the Commission applies the right threshold when deciding on the acceptance of a request lodged by the Community industry to initiate a trade defence investigation. The threshold is sufficiently high but does not, however, put an undue burden on the Community industry requesting action because they claim to be exposed to dumped or subsidised imports.

- The study looked in detail at the division of competences between the Commission and Member States. Under the existing system, the Commission is responsible for initiating and conducting investigations as well as for adopting provisional measures. Member States decide by simple majority and on the proposal of the Commission whether or not definitive anti-dumping or anti-subsidy measures should be adopted.[2] In this context, the study considered whether the Community's competences in this field should be fully transferred to the Commission (as in State aid) and whether an agency should be established. The study argues that the current set-up is appropriate not least because of the importance Member States attach to trade defence instruments and because Member States play a valuable role in trade defence investigations. In this context, the study also endorsed the change in the decision making process of Member States adopted in 2004 as well as the Eurocoton judgment of the Court of Justice.

- The study also examined in depth the investigation process. It concluded that this worked very well (notably in respect of transparency of the process in general, clarity of questionnaires and other requests for information, protection of confidential information, concept of non-cooperation as compared to US, progress of investigation when imposing provisional measures, level of measures as compared to those imposed by the US, overall duration of investigation, rules on expiry reviews).

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[1] However, matters are often not so black or white. A party complaining against trade defence measures because it is a user of the product in question may find itself at some other point in time on the other side of the fence, i.e. seeking the adoption of such measures.

[2] There are a number of differences with regard to the safeguard instruments.

- The study equally covered the substantive rules of the Community's trade defence instruments. In this respect, stakeholders generally praised the Commission for doing a good job on the dumping calculations and did not raise any major issues with regard to injury and causal link. The study also confirmed that the Community interest test works well.

- The study highlighted that the granting of market economy treatment to individual exporters is not a decision with a political dimension, but merely based on an assessment as to whether an exporter's home market sales are reliable and sufficient for calculating normal value if that exporter is located in a country with an economy in transition.

- Finally, there was overall satisfaction with the effectiveness of measures. The study acknowledged the efforts undertaken to find solutions to any enforcement problems.

FOOD FOR THOUGHT – HOW COULD THE COMMUNITY FURTHER IMPROVE ITS TRADE DEFENCE INSTRUMENTS

While confirming the balanced nature of the EC system and the high standards applied, the evaluation study also suggested a need to reflect on some specific issues and contains some interesting proposals for improvements. These proposals do not affect the core of the current system, but could contribute to improving certain aspects of it, in particular rights of parties and transparency. The most important recommendations are described below.

a) Access to confidential information under an APO[3]-type system

(i) Current rule/practice

In U.S. trade defence practice, access to confidential information is given under an APO-type system. Such a system allows legal representatives to have access to all information on file, including confidential information. If the Community had such a system, a lawyer representing the Community industry could for instance see all confidential documents submitted by an exporter and *vice versa*. The Community does not use such a system, *inter alia*, because it does not fit with its legal culture. Parties' access to confidential information is thus not possible in the EC. Transparency is however ensured via access to the non-confidential summaries of parties' submissions. Obviously, in terms of transparency the EC system is only a second best solution although the Community's system has decidedly other positive effects.

(ii) Recommendation by the study

None of the stakeholders interviewed suggested that the Community should have an APO system. It was the evaluator who posed the question as to whether the Community should introduce it. The evaluator mentions several advantages. For example an APO system would provide "ultimate" transparency and counter arguments that certain aspects of the Commission's work take place in a black box. Indeed, it would be desirable from the point of

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[3] APO stands for administrative protective order.

view of legal process and certainty because counsel and other experts could check all aspects of the Commission's work.

The evaluator also acknowledges the disadvantages of such a system : First, an APO system would greatly increase the cost of being involved in an AD or AS proceeding. As interested parties themselves cannot be granted APO access, it is indispensable to engage counsel in order to be able to benefit from an APO system. Second, to fully respect confidentiality under such a system requires a high and uniform degree of professionalism of lawyers in all 25 Member States. Such a uniform level does probably not yet exist. The study does not recommend the introduction of an APO system but proposes to reflect on this issue.

b) Creation of a hearing/overseeing officer

(i) Current rule/practice

Parties to trade defence investigations can request a hearing in front of a hearing officer. A hearing officer is a Commission official not involved in the case at hand, who should help in clarifying the concerns raised by the party and ensure a further internal check of a party's claims. However, the existence of this possibility is currently neither systematically used nor widely known.

(ii) Recommendation by the study

The study proposed that the Commission is more explicit about this facility. For example it could be highlighted in the notice of initiation or in the original correspondence with interested parties.

c) Identifying the causes of dumping

(i) Current rule/practice

Exporters can normally only engage in dumping if there is some sort of market segregation between the exporter's home market and the export market. However, neither Community law nor WTO rules require that in any anti-dumping investigation the investigating authorities investigate and identify the roots or causes of dumping.

(ii) Recommendation by the study

The study recommended that the Community pursues both an offensive as well as defensive strategy. Given that the Community has a proactive market access initiative, the study proposed to identify situations examined in trade defence investigations where there may be trade barriers that the Community could investigate and challenge under WTO rules.In such instances, the study does not recommend imposing anti-dumping measures, but only that the causes of dumping should be identified. The focus of the proposal is rather to involve other services of DG Trade in addressing the problems of closed export markets or trade barriers.

d) Stronger use of anti-subsidy instrument against imports from non-market economy countries and countries with economies in transition

(i) Current rule/practice

Currently the anti-subsidy instrument is not used with regard to non-market economy countries or countries with an economy in transition. The reason for this is that in view of the significant State-induced distortions in such countries, it is often very difficult to calculate the amount of subsidy or the benefit conferred by the State to an industry. In 'pure' state economies, it can moreover be assumed that there are no market prices so that in principle everything is to some extent subsidised. With regard to these countries, the Commission therefore prefers to use the anti-dumping instrument.

(ii) Recommendation by the study

The study encourages the Commission to consider the use of the anti-subsidy instrument in countries with an economy in transition (e.g. the People's Republic of China).

e) More use of safeguards

(i) Current rule/practice

The Community has traditionally been a very moderate user of the safeguard instrument. The main reasons for this are first, that safeguards instruments are directed against "fair" imports (contrary to anti-dumping and the anti-subsidy instruments which tackle "unfair" imports, i.e. imports which benefit from WTO inconsistent subsidisation or from market segregation in the case of dumping); and second, that they are not against a specific country but *erga omnes*.

(ii) Recommendation by the study

The evaluator supported demands from survey respondents for greater use of safeguard instruments, given the advantages that these instruments offer (e.g. relief for industry comes quicker; initiation of investigation is less burdensome because evidentiary standards are lower).

f) Higher degree of specialisation within trade defence services

(i) Current rule/practice

The Commission's trade defence Directorate is 'lean' as compared to its US counterparts (the US have 83% more cases than the Community but they have 130% more staff). The US operate a system which is more based on specialisation (for instance dumping is investigated by the Department of Commerce while injury is examined by the International Trade Commission); *Inter alia* because of the lean structure, but also in order to avoid that investigators identify themselves with parties concerned, the Community's trade defence staff traditionally has not specialised in individual aspects of the case work, e.g. dumping, injury, specific sectors etc. However, specialisation offers the possibility to obtain even higher degrees of professionalism.

(ii) Recommendation by the study

While the study acknowledges that the non-specialisation of EC staff has a number of advantages (e.g. more flexibility), it submits that "it would be good to have some specialists

such as accountants and perhaps a Chinese speaker." Obviously, this, as some other proposals, has resource implications.

g) Publication of names of members and the agenda of the Advisory committees as well as the positions taken by Member States in Committee meetings

(i) Current rule/practice

Advisory Committees, which consist of representatives of Member States, are consulted at each decisive step of a trade defence investigation (e.g. initiation of investigations and imposition of provisional and final duties). Currently, the rules in the basic regulation foresee the confidentiality of all matters related to the work of the Committees. Reflecting this, the names of the members of Advisory Committees in principle are not publicly available. By the same token, the agenda of committee meetings and the position taken by each Member State in committee meetings are not published.

(ii) Recommendation by the study

The study proposed that all three elements should be published, on the grounds that lobbying has become an important part of the process in adopting trade defence measures. This is more a matter for Member States than for the Commission.

FOLLOW UP

Although the evaluation study very much confirmed the current set-up of the Community's trade defence instruments, the Community will not rest on its laurels. With a view of further improving the instruments, the Commission's services will examine in depth all proposals contained in the evaluation study – where necessary, together with the Member States. Independently of the study, the Commission's services have recently carried out two seminars with stakeholders. Not surprisingly, many of the proposals made in these seminars also coincide with those of the study. The Commission's services are currently looking both at the results of the study and those of the seminars. They will soon present the results of this examination.

FURTHER INFORMATION ON THE COMMUNITY'S TRADE DEFENCE INSTRUMENTS

If you want to have further information on the Community's trade defence instruments, underlying rantionale etc., look in particular at the following parts of the DG Trade's website : http://europa.eu.int/comm/trade/issues/respectrules/index_en.htm and http://europa.eu.int/comm/trade/issues/respectrules/tpi_en.htm

If you have queries about the Community's trade defence actions etc. you can get information from the information contact points (E-Mail : antidumping-icp@cec.eu.int).

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